TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 326

LEWIS LLOYD ANDERSON, PETITIONER,

vs.

ALABAMA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED AUGUST 16, 1960
CERTIORARI GRANTED NOVEMBER 7, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Circuit Court of Dallas County, State of Alabama		
Indictment	1	1
Motion to quash indictment	4	2
Order denying and overruling motion to quash indictment	6	5
Motion to quash venire	7	5
Order denying and overruling motion to quash venire	8	7
Motion to declare void composition of jury sworn to try defendant	9	7
Order denying and overruling motion to declare void composition of jury	10	8
Verdict and judgment	13	8
Sentence	13	9
Motion for new trial	18	9
Order denying and overruling motion for new trial	19	11

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	Original	Print
Record from the Circuit Court of Dallas County, State of Alabama—Continued		
Excerpts from testimony:		
Testimony of Blanchard L. McLeod	28	12
Marguerite Houston—		
direct	31	15
cross	31	16
Miss Durden—		
direct	32	16
cross	32	17
Henry Reese—		
direct	33	18
cross	33	18
Lewis Lloyd Anderson	33	19
William Dinkins—		
direct	34	19
cross	36	21
redirect	36	22
Defendant's Exhibit 1—Jury list	39	25
Testimony of William Dinkins—		
(resumed)—		
recross	41	28
Henry Sylvester Lawson	41	
John Brown—		
direct	43	30
cross	44	31
Glenn H. Defke—		
direct	45	34
cross	47	36
L. R. Harrison—		
direct	48	37
cross	49	38
James Black—		
direct	50	39
cross	52	41
redirect	54	44
Terrell Hicks—		
direct	55	45
cross	56	46
redirect	56	46

	Original	Print
Record from the Circuit Court of Dallas County, State of Alabama—Continued		
Excerpts from testimony:—Continued		
Testimony of James G. Clark—		
direct	56	47
cross	58	48
Glenn H. Defke— (recalled)—		
direct	59	50
cross	61	52
redirect	63	54
P. L. Pyren—		
direct	63	55
cross	65	56
Colloquy between Court and counsel and rulings on motions	66	58
Proceedings in the Court of Appeals of Alabama	209	63
Judgment	209	63
Opinion, Cates, J.	210	64
Application for rehearing	243	91
Order denying application for rehearing	244	92
Proceedings in the Supreme Court of Alabama	245	92
Petition for writ of certiorari	245	92
Opinion (Goodwyn, J.) on denial of petition for writ of certiorari	254	97
Order denying motion to strike petition for writ of certiorari and denying petition for writ of certiorari	257	99
Application for rehearing	258	100
Order denying application for rehearing	259	100
Order allowing certiorari	260	101

[fol. 1]

IN THE CIRCUIT COURT OF DALLAS COUNTY, STATE OF ALABAMA

No. 8799

THE STATE OF ALABAMA, Plaintiff,

vs.

LEWIS LLOYD ANDERSON, Defendant.

INDICTMENT

THE STATE OF ALABAMA,
DALLAS COUNTY

Circuit Court

January ..... Session 1959

The Grand Jury of said County charge that before the finding of this indictment Lewis Lloyd Anderson, whose name to the Grand Jury is otherwise unknown, unlawfully and with malice aforethought, killed Tom Reese, by driving a motor vehicle over, upon or against him, but without premeditation or deliberation.

Against the peace and dignity of the State of Alabama.

Blanchard L. McLeod, Solicitor of 4th Circuit.

No. 8799; The State of Alabama vs. Lewis Lloyd Anderson; Charge: Murder 2d Degree; No Prosecutor; Witnesses: F. M. Barr, Officer Griffin, T. L. Pyron, Bailey Green, Officer Green, James Foster, O. S. Rhodes, L. B. Hunter, Willie Alma Rivers, Peter Woff, Jr., Frank Dubose, Jr., Coleman Woodson.

A True Bill

Irby Moore, Foreman of the Grand Jury.

Grand Jury No. 33

Filed in Open Court 29 day of January, 1959.

M. H. Houston, Clerk

Bail is fixed in this case at 3000.00 Dollars

James A. Hare, Presiding Judge

[fol. 4]

IN CIRCUIT COURT OF DALLAS COUNTY

MOTION TO QUASH INDICTMENT—Filed February 25, 1959

Now, comes the defendant, Lewis Lloyd Anderson, and respectfully moves this Honorable Court to quash the indictment returned in this cause, and to hold the same for naught; and in support of said Motion alleges the following, to-wit:

1. For that defendant is a member of the Negro race and a citizen of the State of Alabama, and of the United States of America, and was at the time the Grand Jury of Dallas County, Alabama returned the indictment in this cause on to-wit: Jan. 28, 1959 and for many years prior thereto, and at the present time, Negroes were, and are, systematically excluded from Grand Juries organized in said County and State, solely because of their race or color; or are discriminated against in the organization of Grand Juries in said County of said State solely because of their race or color in that no member of said race, or a mere token number, are included on the jury roll or have their names placed in the jury box; or if they are placed on the jury roll or in the jury box, they are not drawn for service on any Grand Jury; thereby denying to the defendant due process, and equal protection of the laws guaranteed him by the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States of America.

2. Defendant avers that no Negro served on the Grand Jury which returned the aforesaid indictment against him in this cause, nor has any Negro served on a Dallas County, Alabama Grand Jury in modern times; or if any Negroes have served on any of said Grand Juries, such service has only constituted a mere token number of eligible Negro male citizens.

3. Defendant avers the existence of a system, or practice, or custom, in the drawing or organization of Grand Juries to serve in Dallas County, Alabama, designed to totally exclude Negroes from service on such Grand Juries,

or to discriminate against Negroes solely on account of their race or color, contrary to the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the United States Constitution.

4. Defendant avers that at the time the Grand Jury returned the indictment in this cause, according to the 17th Decennial Census of the United States, its Territories and Possessions for 1950, published by the United States Department of Commerce, Bureau of Census, of which the Courts of Alabama take judicial notice, the White male population of Dallas County, twenty-one (21) years and over, numbers 6,040, and that the Negro male population of said County in said age group numbers 7,956; and defendant avers that the great majority of the aforesaid Negro males are native born citizens of Dallas County, Alabama, householders and freeholders in said County and State, generally reputed to be honest and intelligent men, esteemed in the community for their integrity and good character and that they are not habitual drunkards nor afflicted with [fol. 5] such disease or physical weakness as would disqualify them to discharge the duties of grand jurors, and that they otherwise possess all of the qualifications set out in the Constitution and Laws of the State of Alabama and the United States which govern the selection and service of Grand Jurors, yet the jury commission failed or refused to place on the jury roll, and in the jury box the names of such Negro male citizens of Dallas County, Alabama, and that at the time of said indictment and at the present time, the jury roll of said County contains less than five percent of the names of the total number of Negro males eligible, under the Constitution and Laws of the State of Alabama, and of the United States, for jury duty in said County. Defendant avers further that the method of selection of the names of Negroes be placed on the jury roll and in the jury box of Dallas County, Alabama, by the jury Commission, is highly irregular and arbitrary and contrary to the method prescribed by the Constitution and Laws of the State of Alabama, and of the United States, thereby depriving the defendant of rights guaranteed him by the Constitution and Laws of the said State of Alabama, and by the Constitution of the United States of America, especially

to the Fourteenth Amendment to the Constitution of the United States of America guaranteeing to defendant due process of laws and the equal protection of the laws, and said indictment is void.

5. Defendant avers that members of the Negro race are, solely because of their race or color, arbitrarily, intentionally, and systematically excluded in the selection of persons for Grand Jury duty, in that the great majority of those qualified for service in Dallas County, Alabama, are not included on the jury roll, or if included on said roll, their names are left out of the jury box, or if put into the box and drawn, they are not listed for service, and because of the aforesaid practices, no Negroes, or only a mere token number have served on a Grand Jury in Dallas County, Alabama since the days of Reconstruction, or certainly not in modern times, and defendant avers that the Grand Jury which returned the aforesaid indictment against him was organized according to and in keeping with the aforesaid practice, thereby depriving defendant of due process and equal protection of the laws, guaranteed him by the Constitution and Laws of the State of Alabama, and the Constitution of the United States of America.

Wherefore, the defendant prays that this Court will take notice of this his Motion to Quash the Indictment in the above said cause, and set said Motion down for a hearing, and that your Honor will, after consideration of the evidence and proof which the defendant offers to make, grant said motion.

Louis Lloyd Anderson, Defendant.

Sworn to and subscribed before me this 25th day of February, 1959.

Orzell Billingsley, Jr., Notary Public.

Filed February 25, 1959.

[fol. 6]

IN CIRCUIT COURT OF DALLAS COUNTY

ORDER OF THE COURT DENYING AND OVERRULING MOTION TO QUASH INDICTMENT—February 25, 1959

The motion of the Defendant to quash the indictment was heard, submitted and considered by the Court and it is ordered and adjudged by the Court that the same be and is hereby denied and overruled, to which action of the Court the Defendant does in open Court duly and legally except.

L. S. Moore, Judge.

[fol. 7]

IN CIRCUIT COURT OF DALLAS COUNTY

MOTION TO QUASH VENIRE—Filed February 25, 1959

Comes now the defendant, Lewis Lloyd Anderson, by his attorney, and makes this his Motion to Quash the Venire or array drawn on to-wit the 23rd day of February, 1959, and in support of said Motion alleges the following:

1. The defendant is a member of the Negro race.

2. Members of the Negro race, otherwise qualified to serve have been systematically excluded from service on the aforesaid jury, or discriminated against in the organization of said jury, in that no member of the Negro race has been drawn for service thereon, or a mere token number thereon; that there is no probability of them actually trying or participating in the trial of this, or any other case.

3. Defendant avers the existence of a system or practice in the drawing or organization of juries to serve in Dallas County, Alabama, deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries by either excluding them from the venire altogether or by keeping the number included so small that they can be systematically and uniformly struck from the venire and prevented from serving in the trial of any case.

4. Defendant avers that the white population of Dallas County, Alabama is approximately 6,040 (males over 21 years) and the Negro population (males over 21 years) is 7,956, and that since the year of 1950 and before, and continuing to this date, there has been a uniform practice by the jury commission for Dallas County, Alabama, of discriminating against prospective Negro jurors solely because of their race or color, either by leaving their names off the jury roll or by not including their names in the jury box from which the venire is drawn, so as to keep the number of Negroes actually summoned for jury duty at a token amount.

5. Defendant further avers that members of the Negro race are, solely because of their race and color, arbitrarily, intentionally and systematically excluded from jury service or discriminated against in the selection of persons for jury duty in that the great majority of those qualified to serve in Dallas County, Alabama, are not included on the jury rolls, or their names are left out of the jury box, so that only merely a token number can ever serve; and defendant avers that the venire drawn on to-wit: the 23rd day of February, 1959, was selected in keeping with this practice and that unless this Honorable Court grants this his Motion to Quash the said venire, he will be deprived of his rights as guaranteed by the Constitution and Laws of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, the defendant prays that this Court will take notice of this his Motion to Quash the Venire in this cause, and that your Honor will, after consideration of the evidence and proof which the defendant offers to make, grant said Motion.

[fol. 8] Respectfully made this 25th day of February, 1959.

Louis L. Anderson, Defendant.

Duly sworn to by Louis L. Anderson, jurat omitted in printing.

Filed February 25, 1959.

CERTIFICATE OF SERVICE (omitted in printing).

IN CIRCUIT COURT OF DALLAS COUNTY

ORDER OF THE COURT DENYING AND OVERRULING MOTION TO QUASH VENIRE—February 25, 1959

The motion of the Defendant to quash the venire having been heard, submitted to the Court and considered by the Court it is ordered and adjudged by the Court that the same be and is hereby denied and overruled. To which action on the part of the Court the Defendant does in open Court duly and legally except.

L. S. Moore, Judge.

[fol. 9]

IN CIRCUIT COURT OF DALLAS COUNTY

MOTION TO DECLARE VOID COMPOSITION OF JURY SWORN TO TRY DEFENDANT

Comes the defendant in the above cause and moves the Court to declare void and illegal the composition of the present petit jury sworn to try the defendant, Lewis Lloyd Anderson, in said cause, on the following grounds:

1. That there are no Negroes on said jury organized to try the defendant in this cause and that Negroes were excluded solely because of their race or color.

2. That qualified citizens of Dallas County, Alabama are systematically and arbitrarily excluded from service on the petit juries in said County and State solely because of their race and color.

3. That the exclusion of Negroes from the petit jury organized to try said defendant solely because of their color and race deprived this defendant of his rights to due process of laws and the equal protection of the law guaranteed him by the Constitution and Laws of the State of Alabama and the Fourteenth Amendment of the United States of America.

Wherefore, the defendant prays that this court will take notice of this his motion in this cause, and that your Honor

will after consideration of the evidence and proof which the defendant offers to make, grant said Motion.

Respectfully made this 26 day of Feb. 1959.

Louis Lloyd Anderson, Defendant.

Duly sworn to by Louis Lloyd Anderson, jurat omitted in printing.

[fol. 10]

IN CIRCUIT COURT OF DALLAS COUNTY

ORDER OF THE COURT DENYING AND OVERRULING MOTION TO DECLARE VOID COMPOSITION OF JURY—February 26, 1959

The motion of the Defendant to declare void and illegal the composition of the present petit Jury sworn to try the Defendant having been heard by the Court and submitted to the Court and considered by the Court it is ordered and adjudged by the Court that same be and is hereby denied and overruled, to which action on the part of the Court the Defendant does in open Court duly and legally except.

L. S. Moore, Judge.

[fol. 13]

IN CIRCUIT COURT OF DALLAS COUNTY

VERDICT AND JUDGMENT—February 27, 1959

Comes the State of Alabama, by its Solicitors, and also comes the Defendant, Lewis Lloyd Anderson, in his own proper person and by and with his attorneys, and being duly and legally arraigned in open Court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue being joined:

Thereupon came a jury of good and lawful men, to-wit: Paul M. Friday, and eleven others, who having been impanelled and duly sworn according to law, on their oaths say, "We, the jury, find the Defendant guilty of manslaughter in the first degree as charged in the indictment, and fix his punishment at imprisonment in the Penitentiary of Alabama for 10 years. Paul M. Friday, Foreman."

IN CIRCUIT COURT OF DALLAS COUNTY

SENTENCE —February 27, 1959

And now, on this day, to-wit: February 27, 1959, the Defendant, Lewis Lloyd Anderson, being personally present in open Court, and being attended by his attorneys, was asked by the Court if he had anything to say why the sentence of the law should not be pronounced upon him, and he said, "I do not think I got justice."

It is therefore considered and adjudged accordingly by the Court that the Defendant is guilty of manslaughter in the first degree as charged in the indictment and as punishment for said offense, the Defendant is sentenced to imprisonment in the penitentiary of Alabama for ten years.

[fol. 18]

IN CIRCUIT COURT OF DALLAS COUNTY

MOTION FOR NEW TRIAL—Filed March 27, 1959

Comes now the defendant, Lewis Lloyd Anderson, and moves this Honorable Court to set aside the verdict and judgment rendered in this cause on to-wit: February 27, 1959, and to grant the defendant a New Trial, and as grounds for said Motion sets out and assigns the following:

1. For that the verdict of the jury is contrary to the law in this case.

2. For that the verdict of the jury is not sustained by the great preponderance of the evidence in this case.

3. For that the judgment of the court is contrary to the facts in this case.

4. For that the judgment of the court is contrary to the law in this case.

5. For that the judgment of the court is not sustained by the great preponderance of evidence in this case.

6. For that the verdict of the jury and the sentence of the Court are so unfair as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling defendant's Motion to quash the indictment, on constitutional grounds, before putting defendant to trial in this cause.

9. For that the Court erred in overruling defendant's demurrers filed in this cause.

10. For that the Court erred in overruling defendant's Motion to Quash the Venire on grounds that Negroes had been systematically excluded therefrom, because of their race or color in violation of rights and privileges guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

11. For that the verdict of the jury is based on bias, prejudice and passion against defendant.

12. For that the Court erred in denying defendant's Motion to Declare void and illegal the petit jury drawn to try defendant in this cause, in that there were no Negroes serving on said petit jury.

13. For that the Court erred in denying defendant's Motion to Quash Venire and Motion to Quash Indictment returned against the defendant on the grounds that Negroes qualified for jury service in Dallas County, Alabama, are arbitrarily, systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution.

14. That the Court erred in denying the defendant's Motion to Quash Indictment returned against defendant in this cause, in that no Negro served on the Grand Jury which returned aforesaid indictment against defendant in this cause, and in the face of the great preponderance of the evidence presented to show that few, if any, Negroes [fol. 19] had ever served on a grand jury in Dallas County, Alabama, in modern times.

15. For that the Court erred in overruling the defendant's several objections throughout the hearing of this

cause, to which rulings the defendant reserved proper exceptions.

16. For that the Court erred in overruling defendant's Motion to exclude the evidence in this cause, and for judgment.

17. For that the Court erred in overruling defendant's Motion to set aside the verdict of the jury and for judgment in this cause.

Fred D. Gray, Peter A. Hall, Orzell Billingsley, Jr.,
Attorneys for Defendant.

Certificate of Service (omitted in printing).

Take notice that the above said Motion is set for hearing before me on the 24 day of April, 1959, at 10:00 o'clock.

James A. Hare, Circuit Judge.

Filed March 27, 1959.

IN CIRCUIT COURT OF DALLAS COUNTY

ORDER DENYING AND OVERRULING MOTION FOR NEW TRIAL —May 1, 1959

May 1, 1959. This being the day heretofore set and appointed by the Court to hear and pass upon the motion of the Defendant for a new trial in this cause and the Court having heard the same and the same having been submitted to the Court and the Court having considered the same the Court is of the opinion that said motion is not well taken [fol. 20] and should be denied and overruled.

It is, therefore, ordered and adjudged by the Court, and it is the Judgment of the Court, that the motion of the Defendant for a new trial in this cause is not well taken and that the same be, and is hereby, denied and overruled.

To which action and judgment of the Court the Defendant does in open Court duly and legally except.

This the 1st day of May, 1959.

L. S. Moore, Judge.

[fol. 28] Direct examination.

By Attorney Hall:

Q. Is this Mr. Blanchard McLeod?
A. Yes.

Attorney Hall: Your Honor please, may I approach you?
The Court: Yes. (Attorney Hall went up to the bench.)
The Court: Do you want them under the rule?
Mr. McLeod: It makes no difference.
Attorney Billingsley: We will let them stay in here.
The Court: That is entirely up to you. The solicitor says he waives the rule.

Q. Please state your name?
A. Blanchard L. McLeod.
Q. Your position, please, sir?
A. I am Solicitor, Circuit Solicitor of the 4th Judicial Circuit of Alabama.
Q. That includes Dallas County, does it?
A. That does.
Q. How long have you been Circuit Solicitor?
A. Since August 24, 1954.
Q. As such Circuit Solicitor, are you present at the organization of grand juries?
A. I am.
Q. How often are grand juries organized in Dallas County?
A. Twice a year.
Q. Twice in a year. And you have attended organizations since 1954?
A. August 24, 1954.
[fol. 29] Q. Since that time how many negroes served on any grand jury in Dallas County?
A. None.
Q. Did any negro serve on the present grand jury?
A. They did not.

Q. Did you as Circuit Solicitor for Dallas County present the evidence to the grand jury which indicted this defendant?

A. I did.

Q. And you know that no negroes served on that grand jury at all?

A. That is true; they did not.

Attorney Hall: That is all, sir.

The Court: Mr. McLeod, have you got any other statement you want to add to that in connection with this motion since you are on the stand?

Mr. McLeod: Yes, sir. I would like to say that since I have been Solicitor I have held court in this county a minimum of four times per year and I have never seen a jury drawn—

The Court: You mean whole venire?

Mr. McLeod: Whole venire, that there was not negroes on that venire.

The Court: Has there been negroes on the venire from which each of the grand juries were drawn and selected?

Mr. McLeod: Yes, sir, there were.

The Court: That is since you have been Solicitor?

Mr. McLeod: That has happened every time since I have been Solicitor, that is, each time you have drawn grand juries from venires, there were negroes also on the venire.

The Court: There were negroes also on that venire?

Mr. McLeod: Yes, sir.

The Court: Present in Court?

Mr. McLeod: Present in Court.

One time I learned negroes before they were drawn on the grand jury would come up and request the Court to excuse them, and the Court granted the request and there was none left in the hat; but that was done all on their request.

The Court: Was that done one or more times?

Mr. McLeod: I can recall one time when they all asked the Court to excuse them, and the Court granted it.

The Court: On other occasions when grand juries were drawn, there were negroes still left on the venire and their

cards placed in the hat from which the grand jury was drawn?

[fol. 30] Mr. McLeod: That is true, Your Honor.

Redirect examination.

By Attorney Hall:

Q. Can you give the average maximum number of negroes who were on a venire?

A. I would say in my opinion the maximum I have seen would be seven or eight.

Q. What was the size of the venire?

A. Normally it is around seventy.

Q. Seventy?

A. That is right.

Q. Out of seventy the largest number of negroes you have ever seen is seven or eight?

A. That is right.

Where we have a criminal session we have special jurors. I don't know whether they were negro or white; but I am talking about the regular jurors when I say seven or eight.

Attorney Hall: That is all.

The Court: Now, of the seventy that usually are drawn you say when we are organizing a grand jury, of all of those found, do we have seventy before us?

Mr. McLeod: No, sir. There are also some that are not found. I cannot say what percentage those might be white or colored. I do know some white people weren't, and I can't say some negroes were not found; but I do know we never have all of them, no, sir. They were out of town and doctors' certificates, something of that nature. We never have one hundred per cent.

Redirect examination.

By Attorney Hall:

Q. Are there any negroes on the present venire drawn for the trial of this case?

A. There is.

Q. Do you know, of your own knowledge know the number of negroes in that venire?

A. I cannot say, except this, I know one of them claimed to be over age and claimed his exemption, which had to be granted. And I know another named Tom Waller that was drawn and had an attack and had to be excused. And I know a third was excused on account of sickness and never made an appearance I know.

Q. Are there two more left on the present venire?

A. I know two.

[fol. 31] The Court: All told you had how many?

Mr. McLeod: I know of my knowledge five.

Q. Five on the present venire?

A. I know that of my knowledge. I am trying to think if there wasn't more.

Attorney Hall: That is all.

We would like to call Mrs. Marguerite Houston.

Mrs. Marguerite Houston, Called by Defendant, having been duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. You are presently Circuit Clerk, are you not?

A. Yes.

Q. At one time were you Secretary of the Jury Commission of Dallas County?

A. Well, between the years—well, right up to '53.

Q. '53?

A. About three years in there.

Q. During the time you were Secretary of the Jury Commission, do you know of any negroes ever serving on a grand jury in Dallas County?

A. Peter, I just can't remember directly, but I don't know (sic) know, because, you know, lots of times I don't know who they are; and Mr. McLeod I expect would know better about that than I.

Q. You are presently Circuit Clerk?

A. That is right.

Q. Do you in that position know whether or not any

negroes served on the present grand jury, the one that indicted this defendant?

A. Well, I don't think there were any. You see I don't know them by their name.

Attorney: That is all, thank you.

Cross examination.

By Mr. McLeod:

Q. During the time you have been Circuit Clerk have negroes been drawn every session of Court?

A. Oh, yes, sir.

The Court: Drawn as what?

Q. Drawn as jurors for Dallas County?

A. Yes, sir.

Q. Did you ever make a check to find out how many negroes or whites?

A. No, sir, not directly; but I know there would always be several.

Q. Several?

A. Yes, sir. Sometimes more, sometimes fewer.

[fol. 32] Q. On this card that is drawn from the jury box, from which card you prepare the subpoenas for the Sheriff to serve them, is there anything on that card to show whether they are negroes or white?

A. No, sir.

Q. So it is just a bunch of names to you?

A. That is it.

Mr. McLeod: That is all, Mrs. Houston.

Attorney Hall: Miss Durden.

Miss Durden, Called by Defendant, on motion, having been duly sworn by the Court, testified, as follows:

Direct examination.

By Attorney Hall:

Q. Is this Miss Durden?

A. Yes.

Q. Are you at present Secretary of the Jury Commission?

A. Clerk of the Jury Commission.

Q. What are your duties as Clerk, Miss Durden?

A. Uh, well, I type the roll, the jury roll, as it is given to me; and I type the card, the jury card; and I write the minutes for the Jury Commission; and then I post the venire to the jury roll.

Q. Now, do you by any chance ever go out to the precincts to make up the jury roll or just list?

A. No, I do not. I just do clerical work, is my duty.

Q. You have no contact at all with the jury venire, do you?

A. I do not.

Q. You do not know whether they are white or colored?

A. They would be just names.

Q. Would there by any way to ascertain from their job or address?

A. No.

Q. I will ask you of your own knowledge if you know whether any negroes served on any grand jury in Dallas County since you have been in your present job?

A. Not that I know of.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. I believe you say the names are in such manner you don't know whether they are colored or white?

A. I do not.

The Court: He asked since you have been on your present job, how long have you been in it?

[fol. 33] A. Since, I believe it was September of 1954, when I became Clerk of the Jury Commission.

The Court: Come down.

Attorney Hall: Mr. Henry Reese.

HENRY REESE, A Witness called by Defendant on Motion, having been duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. Are you Solicitor of Dallas County?
A. No. I am Deputy Solicitor.
Q. Deputy Solicitor of Dallas County. As such do you attend the organization of grand juries in this County?
A. Most of the time. When the Solicitor asks me to be there; I am there most of the time.
Q. How long have you served in that position?
A. Oh, a number of years.
Q. As many as ten or fifteen or twenty?
A. Yes.
Q. Have you during that period of time known of any time a negro ever served on a grand jury in Dallas County?
A. Once or twice.
Q. Have any served in recent years?
A. Not in the last three years.
Q. Not in the last three years. And none served on the grand jury which indicted this defendant?
A. No.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. Four or five years ago, just before I became Solicitor, when Mr. Walter Givhan was foreman of the grand jury, which would be approximately '53, or the early part of '54, wasn't there a negro that served on the grand jury at that time?
A. I think so.

The Court: Any other questions?
Mr. McLeod: No, sir.
The Court: Come down.
Attorney Hall: Take the stand.

LEWIS LLOYD ANDERSON, The Defendant, having been duly sworn by the Court, testified, as follows, on Motion:

Direct examination.

[fol. 34] By Attorney Hall:

Q. What is your name?
A. Lewis Lloyd Anderson.
Q. Are you a citizen of Selma?
A. Yes, I am.
Q. Is that in Dallas County, Alabama?
A. Yes.
Q. Are you a citizen of the United States?
A. Yes. I am, sir.

Attorney Hall: That is all.
Mr. McLeod: No questions.

WILLIAM DINKINS, A Witness called by Defendant on Motion, having been duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. Will you state your name?
A. William H. Dinkins.
Q. Where do you live?
A. Selma, Alabama.
Q. Give us your address.
A. 700 Small Avenue, sir.
Q. Selma, Alabama?
A. Yes.
Q. How long have you lived here?
A. I have lived in Selma for sixty-five years.
Q. This is your home?
A. Yes.
Q. Are you a native born Alabamian?
A. Yes, sir.
Q. Born in the State?
A. Yes, sir.
Q. Born in this County?

A. No, sir.

Q. What County?

A. I was born in Perry County.

Q. But moved to Dallas County. That was about when?

A. I came to Dallas County in 1894, the month of January.

Q. Have you been continuously a resident of Dallas County since that time?

A. Yes, except when I was away at school and in the army.

Q. Where did you go to school?

A. I went to school first at what we called the Alabama Baptist Colored University, now called Selma University. Then I went away.

[fol. 35] Q. Where did you go?

A. I went to Brown University, Providence, Rhode Island.

Q. Did you get a degree there?

A. Yes.

Q. Where else did you go?

A. I attended the University of Chicago a short time. I went to Columbia University, New York.

Q. What degrees do you hold, if any?

A. B. A. from Brown, and M. A. from Columbia.

Q. Have you ever served on a petit or grand jury in Dallas County?

A. No, sir.

Q. Have you ever been convicted of a crime in this county?

A. No, sir.

Q. Have you ever served a penal term in this county?

A. No, sir.

Q. Have you ever had occasion to be excused from serving on a venire in this county?

A. No, sir.

Q. Have you of your own knowledge known of any negro who served on a grand jury in Dallas County, Alabama?

A. I don't know anything about grand juries.

Q. Listen closely to the question. Do you of your own knowledge know of any negro who has served on a grand jury in Dallas County, Alabama, during the time you have lived here?

A. No, sir.

Q. Do you know of your own knowledge know of a negro who served on a petit jury in Dallas County, Alabama? That is, during the time you lived here?

A. No.

Q. Are you the member of any honor society?

A. Honor society?

Q. Yes.

A. Yes, sir.

Q. What are they?

A. I am a member of one honor society?

Q. What is that?

A. Phi Beta Kappa.

Q. Is that a national society?

A. Yes.

Q. Are you at present a member of Phi Beta Kappa?

[fol. 36] A. Yes.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. What is your name?

A. William H. Dinkins.

Q. What is your occupation?

A. My occupation at present is salesman, my own business, Dinkins Specialty House.

Q. Previous to that I believe you were a preacher and teacher?

A. No, sir, a teacher.

Q. Teacher. Have you ever known of any teacher or any preacher serving on a jury?

A. I don't know anything about the composition of juries.

Q. And did you know that preachers and teachers are exempt from jury duty?

A. I did not know that.

Q. You didn't know that?

A. No, sir.

Q. How old were you when you started into business for yourself?

A. I was sixty years old.

Q. There was only a five-year period in there you were qualified to serve on a jury, if teachers are exempt, then you had only from sixty to sixty-five to serve, if sixty-five is exempt.

A. I am sixty eight and a half now. I stopped teaching about eight and a half years ago.

Q. Do you know one Roosevelt Dawson?

A. No, sir.

Q. Have you ever heard of him?

A. No, sir.

Q. So you don't know whether a negro ever served on a grand jury, or not?

A. No, sir. I don't know anything about it.

Redirect examination.

By Attorney Hall:

Q. But you don't know of any who have served?

A. No, sir, I don't know of any who have served.

Q. Would you say Selma is a very large town?

A. No, sir. I would say Selma is a small town.

Q. Would you say Dallas County is very large?

A. A pretty large area; but the population is not.

Q. Are you widely acquainted in Selma and Dallas County?

A. Well, more people know me than I know, I am sure.

[fol. 37] Q. You don't know of any serving?

A. No, sir.

Q. Look at this and see if you can tell me what this is?

A. This is a jury list, criminal Court, February 23, 1959 term.

Attorney Hall: Will you take judicial knowledge of the fact this is a just (sic) list for the present term of Court?

The Court: Do you want to introduce it?

Attorney Hall: Well, yes, sir.

I want it properly labeled. It is not labeled jury list of Dallas County; and I want it admitted as a jury list of Dallas County.

The Court: I imagine the Solicitor can—is this a complete jury list, Mrs. Houston? Is this a complete list on which they were subpoenaed?

The Clerk: Yes, sir.

The Court: I think I will admit that.

Mr. McLeod: I will admit it is a jury list.

Attorney Hall: Well, I would like it marked for identification.

(Thereupon, said paper was marked by Reporter: "For Ident Deft Ex #1 2/25/59 SAK.")

The Court: That is a list of the regular jury, you understand. Special jurors summonsed to this Court are not on this list.

Attorney Hall: This is the list from which most of the venire will be drawn to try this case?

The Court: Yes.

Do you admit that?

Mr. McLeod: Yes, sir.

Attorney Hall: All right.

The Court: There is some marks in red ink.

Attorney Hall: I don't ask him to make any admission as to this—just the printed matter.

Mr. McLeod: I don't mind.

Attorney Hall: Nothing but the printed matter.

Q. I will ask you to look at Defendant's Exhibit No. 1 For Identification, and read down at item 10 straight across for us.

A. Item what?

Q. Ten.

A. W. David Holladay, Preacher and Teacher, Plantersville, Alabama.

Q. What does preacher and teacher tend to identify?

A. His occupation, and identifies his name on the same line.

Q. He is juror number 10?

A. Yes.

[fol. 38] Q. Called for the present session of this Court, according to this paper?

A. Yes, sir.

Attorney Hall: We offer in evidence Defendant's Exhibit No. 1 For Identification as Defendant's Exhibit No. 1.

(Thereupon, said paper was received in evidence, and marked by the Court Reporter: "Deft Ex #1 2/25/59 SAK." Same is here below copied, beginning on next page.)

For Def't Deft Ex #1 2/23/59 SAK Deft Ex #1 2/23/59 SAK

DEFENDANT'S EXHIBIT NO. 1 (MOTION)

JURY LIST, SPECIAL COURT, FEBRUARY 23, 1959, TERM.

No.	Name	Occupation	Res. Address	Bus. Address
1	- Charles S. oPotter	Farmer	Harrells	
2	- Edward O'Cwynn		614 Alabama	Lee Del. Co.
3	- C. C. Rivers, 3rd.	Merchant	Sardis RFD	Same
4	- James P. Wade		Rt 2, Selma	
5	- William Capoe Sherrer	Merchant	Plantersville	Same
6	- Edward McCrory		Summerfield Road	
7	- John S. Faulk, Jr.		[illegible]	Faulk Lbr. Co.
(8)	- James G. Watson		Rt 4, Selma	Kenan Place
9	- Charles W. Hooper	Real Estate	Orrville Rd	C. W. Hooper Agency
(10)	- W. David Wells	Preacher & Teacher	Plantersville,	Ala.
(11)	Harry H. Miller	Farmer	Safford	
(12)	- Mercy L. Daniels	Farmer	Orrville	Orrville
(13)	- Thomas H. Wright			Sou R R
(14)	- J.C. Garrett	Fryer	2000 Fairview	McGough Bakery
15	- William E. Rush		Rt 4 Selma	Craig Field
(16)	- A. L. Crew	Cont.	Summerfield	
17	- Woodrow W. Wyatt		Selma Rt 6 Bx 135	Orkin Exterm Co.
18	- Walter B. Fewlkes, Jr.		700-A Mabry	Independent Lock Co.
19	- James C. Rogers	Farmer	Harrells	
20	- C. Wendell Parrish		301 Church	YMCA
21	- R. D. Browning, Jr.	Farmer	Pleasant Hill	Same
22	- W. Robert Simmons	Farmer	Sardis RFD	Same
23	- Jos. C. Garrett		Rt 2	Laurama Bros. Plant

37 - James E. Jones rchant

38 - Ernest L. Glass

39 - John S. [illegible]

40 - E. L. [illegible]

41 - Paul M. [illegible]

42 - John T. Moore

43 - David P. [illegible] Plants Mgr.

44 - John M. Booten Selma Natl Ba

45 - Charles H. Fisher Service Stati

46 - Albert P. Davenport

47 - Fred A. Berzer Post Office B

48 - Frederick C. Moore

49 - William E. Browning, Jr. Poultry

50 - Leander Williamwhitley-Farmer

51 - C.Eugene Gantt

52 - Phillip L. Tippett Employment Of

53 - McKiver Lide

54 - Carl B. Oxford Merchant Esq.

55 - Kenneth Lavender Farmer

56 - Robert Jones Esq.

57 - Guy E. Crabb

58 - James W. Englett, Jr. Farmer Esq.

59 - R. Julian Powell Esq.

60 Theodore Coffee Owner

61 - Bonnie Phillips Chauffeur

62 - Lee A. Henderson

63.- Lyle N. Smith Farmer

[illegible]sford RFD	Same
410 Battery Ave.	Ala. Power Co.
[illegible]4th Ave	[illegible]er Co
[illegible]a, Route [illegible]	
[illegible] Furniss Ave.	
Burnsville	[illegible]
3 Cedar Drive	Selma [illegible] Co.-Mgr.

[illegible]k [illegible]way 80 West

[illegible] 135 Grove Lane, Selma

[illegible]25 Selma	Selma Steam Laundry
[illegible]ployee - Burnsville	Post Office
[illegible]rville	Orrville
[illegible]ver RFD	Tyler
[illegible] Mansion	
Orrville	Orrville

[illegible]ice - Selma, U S 80 West

RFD Sardis	Craig Field
Orrville	Orrville
Montg Hiway	Same
629 Tremont	
1218 10th Ave Rt 4	Craig Field
Orrville	Orrville
900 Mabry	
119 Mallory Drive	CoffeePtg Co.
1218 Washington	
Selma, Route 6, Box 207	
Carlowville	Same

[fol. 41] Attorney Hall: That is all.

Recross examination.

By Mr. McLeod:

Q. I show you Defendant's Exhibit No. 1. By his name isn't there the letters Ex?

A. Yes, sir. Ex is there in red ink.

Q. It is?

A. Yes.

Mr. McLeod: Now, will you agree with me that handwriting stands for excused?

Attorney Hall: To that extent, not for what reason.

Mr. McLeod: That is right, just to that extent.

Attorney Hall: All right.

Is it agreeable to you if we let the red matter in? Let it all in?

Mr. McLeod: That is all right.

Attorney Hall: We offer that Your Honor.

Mr. McLeod: That is all right.

The Court: All right. It is agreed and stipulated, is it, the writing as well as the printed matter is admitted on that Defendant's Exhibit No. 1?

Mr. McLeod: Right.

Attorney Hall: Yes, sir.

Mr. McLeod: That is all.

The Court: Come down.

Henry Sylvester Lawson, A Witness called by Defendant, on Motion, having been duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. What is your name, please?

A. Henry Sylvester Lawson.

Q. Where do you live?

A. 901 Minter Ave.

Q. Selma, Dallas County, Alabama?

A. Yes, sir, Selma, Dallas County, Alabama.
Q. What is your occupation?
A. I used to be miscellaneous at the oil mill, but now you might say I am retired. My plant went down.
Q. You worked as a laborer at the oil mill?
A. Miscellaneous—mechanic.
Q. Mechanic at the oil mill in Selma?
A. That is right.
Q. How long did you work on that job?
[fol. 42] A. Forty-one years.
Q. When did you retire?
A. I have retired, the plant shut down, went out of business. I retired this coming July 8.
Q. You still work in that oil mill?
A. No. I have a business with my wife now, she operates a store.
Q. Have you ever served on a grand jury or any kind of jury in the County?
A. Oh, when I was a kid.
Q. When you were a child?
A. Not on the grand jury; I served on the City Court.
Q. How long ago was that?
A. That has been quite a while.
Q. About what year would you say?
A. It wouldn't be too long, maybe ten or fifteen years.
Q. Ten or fifteen years in your best judgment?
A. Yes.
Q. How many negroes served on that jury with you at that time? How many other negroes were on the jury panel?
A. There wasn't no negroes there.
Q. You don't understand me I don't think. When you say in the municipal court, do you mean you served on a jury?
A. No. I was called for a witness.
Q. Have you ever served on a jury?
A. No, no.
Q. Have you ever served on a jury in any court?
A. No, sir.
Q. Any kind of jury?

A. No, no.
Q. Have you ever been arrested?
A. No, no.
Q. For any kind of crime around in Dallas County?
A. No, no.
Q. Do you know of any negroes who served on juries in Dallas County?
A. No, I don't know. I just heard tell of some being called but they didn't serve.
Q. You heard of some being called but they didn't serve?
A. Didn't serve.
Q. Have you ever been called?
A. No, sir.

[fol. 43] Attorney Hall: That is all.
Mr. McLeod: That is all.

JOHN BROWN, A Witness called by Defendant on Motion, being duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. Is your name John Brown?
A. That is right.
Q. Tell the Court what your address is, where you live?
A. Route 1, Selma, Alabama, Box 79.
Q. That is in Dallas County, Alabama, isn't it?
A. That is right.
Q. How long have you lived there?
A. Where I am now eighteen years.
Q. You are a negro, are you not?
A. That is right.
Q. Do you know William Dinkins?
A. I do.
Q. Is he a negro?
A. Yes, sir.
Q. Have you ever served on any jury at all?
A. I was summonsed to, for the jury, summonsed to the Federal jury.
Q. When was that?

A. That was in 1958.

Q. You were summonsed, summonsed for jury service for the District Court here in Selma of the Federal Court?

A. That is right.

Q. Have you served on any State Court jury?

A. No.

Q. Any petit jury that tried a defendant?

A. No.

Q. Have you ever served on a grand jury in the county?

A. No.

Q. Do you know any negro who has served on such jury?

A. I can't remember. In fact, I haven't been around in court too much.

Q. So you don't know any such negro, do you?

A. No, I don't.

Q. How long ago was it you said a subpoena was served for Federal jury duty?

A. 1957.

Q. 1957. Have you since 1957 been convicted of any crime?

A. No.

[fol. 44] Q. For any serious crime, have you?

A. No.

Q. Involving moral turpitude?

A. No.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. Have you ever been subpoenaed to State Court as a juror in Dallas County?

A. No, sir.

Q. Do you know whether your name is in the box?

A. I really don't.

Q. Do you know Roosevelt Dawson? Do you know whether he is colored or white?

A. I don't know.

Q. And do you come around to court much?

A. No, sir, not too much.

Q. Did you ever come up here as a witness or anything?

A. No, sir.

Q. You don't know whether negroes are subpoenaed up here for jury duty, do you?

A. Well, I have seen some that had a paper that said they were subpoenaed.

Q. And you recognized the name and knew them to be negroes?

A. Yes, sir.

Q. And you didn't check to see how many was negroes and how many was white, did you?

A. No, sir.

Mr. McLeod: That is all.

Attorney Hall: That is all.

The Court: Do you mind if I ask a question?

Attorney Hall: No, sir.

The Court: Do you know how many negroes served as jurors here at the fall session of this Court last fall?

The Witness: No, sir.

The Court: Were you present in Court?

The Witness: No, sir.

The Court: And so far as you know there could have been several, there might not have been any or might have been fifty, is that your testimony?

The Witness: Yes, sir.

The Court: When you say you don't know, are you saying there hadn't been any negroes serving in court on the jury or are you saying you you (sic) just don't know whether there had been any, or not?

[fol. 45] A. I just don't know.

Q. You don't know?

A. No.

By Mr. McLeod:

Q. You stated you served here sometime in 1957 in Federal Court, is that right?

A. Yes, sir.

Q. Now, you remember when the Court House fell in over here, don't you?

A. Yes, sir.
Q. And that was in 1957, wasn't it?
A. Yes, sir.
Q. And ever since then we have been having Court here, haven't we?
A. Yes, sir.
Q. Now, who was Judge when you came up and served?
A. Judge Daniel Thomas.
Q. And he was the Federal Judge?
A. Yes, sir.

Mr. McLeod: That is all.
Call John Brown back.

Q. You stated you were subpoenaed in 1957. When you answered the question while ago, did you mean that you were subpoenaed up here as a juror or actually served in the box on the trial of a case?
A. I didn't serve. I was just subpoenaed.
Q. But didn't try any cases?
A. No, sir.
Q. I know you didn't count them, but your best knowledge how many men would you say stood up and were sworn in as jurors at that time in Federal Court? Now just to your best knowledge.
A. It was about thirty.
Q. Well, how many were negroes on there to your best knowledge?
A. Two of us.
Q. Two?
A. Yes, sir.
Q. That was two out of thirty were negroes?
A. Yes, sir.
Q. That is in Federal Court?
A. Yes, sir.

Mr. McLeod: That is all.

GLENN H. DEFKE, A Witness called by Defendant, on Motion, having been duly sworn, testified, as follows:

[fol. 46] Direct examination.

By Attorney Hall:

Q. What is your name?

A. Glenn H. Defke.

Q. What is your occupation, please, sir?

A. Well, I do a little real estate and a little appraisal, and happen to be Chairman of the Jury Commission. I guess that is what you want to know.

Q. Yes, sir.

How long have you been Chairman of the Jury Commission of Dallas County?

A. Since April, 1954.

Q. Since that time have you participated in preparing the rolls in Dallas County?

A. Yes, I have.

Q. Have you interviewed prospective jurors?

A. I have.

Q. How many members on the Jury Commission?

A. Three.

Q. Do the three of you get together and decide when you are going to add names to the jury list?

A. That is right.

Q. Can you tell the Court—excuse me—how many names are on the jury list in Dallas County all together?

A. I never counted. I don't know.

Q. Do you have any judgment of the number of those names who are negroes?

A. Well, I don't know all of them that are registered. I don't know all the whites or non-whites; but I guess one in twelve would be non-white.

Q. One in twelve?

A. Yes.

Q. Would you care to give us an estimate of the total number of jurors on the register?

A. I would guess somewhere around eighteen hundred.

Q. Eighteen hundred. Now, Captain, do you have occa-

sion to be in Court when grand juries are organized or have you since you have been jury commissioner?

A. I never have been in Court. This is the first time I have been in Court since I have been on the Jury Commission.

Q. You wouldn't know the composition of grand juries or petit juries?

A. No.

Q. Do you have any particular method in determining to put negroes or whites on the jury roll?

[fol. 47] The Court: On the roll?

Q. On the jury list—I withdraw the question.

Captain, how do you handle your duties going about making up a list of names from which to draw juries from in this County?

A. Well, I go to different parts of the county and know good men and ask them about folks, and other jury commissioners have done the same thing. A good many I know personally.

Q. Then those you decide to select as veniremen you put on the list or roll?

A. Well, they are entered on the list or roll, we keep a list. Each name corresponds with a card that goes in the box.

Q. You make out a card and put it in the jury box?

A. Yes, sir.

Q. The card corresponds with each name on the rolls?

A. Yes, sir.

Q. How do you arrive at putting a name on the roll—I believe you answered, you say you interview personally and other members interview likewise. Do you interview negro and white prospective jurors?

A. The same way, interview both.

Q. You go into the precincts?

A. Not all of them. I have been in several, but not all.

Q. Assume you went to one particular precinct, do you visit that precinct and interview every man over twenty-one?

A. No.

Q. What do you get the list from, how do you arrive at the names of those you are going to interview?

A. I talk to people. I know citizens, high class folks in various parts of the county, and I can go by their recommendations. We try to get good folks, is the way we try to do.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. When you prepare your jury box, you don't have anything to do with drawing them out of there to serve in Court, do you?

A. Not a thing.

Q. That is the Judge's responsibility, isn't it?

A. Yes, sir.

Q. When the Judge reaches in the box to draw a name out, is there any way he can look at those cards and tell whether he is drawing a white man or negro out of that box? [fol. 48] A. No way at all. The cards are all similar.

Mr. McLeod: That is all.

A. May I volunteer a statement?

Mr. McLeod: Yes, sir.

Attorney Hall: I beg pardon. I object to any voluntary statement.

The Court: All right.

Any other questions.

Mr. McLeod: No, sir.

The Court: He put you on the stand.

All right, Captain, come down.

Attorney Hall: Call L. R. Harrison.

L. R. Harrison, A Witness called by Defendant on Motion, being duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. What is your name?
A. L. R. Harrison.
Q. What is your occupation?
A. Minister.
Q. How long have you been a minister?
A. Three years.
Q. Where do you live?
A. 219-A George Washington Carver Homes.
Q. This your native county?
A. That is right.
Q. What did you do before you became a minister?
A. I was in school.
Q. Where?
A. Selma University.
Q. Let me understand, you went to Selma University after you got through academic training and took theology right away?
A. That is right.
Q. No period in between?
A. I went in service in 1951, and stayed until 1953, U. S. Air Force.
Q. And after 1953 you came back to Selma?
A. That is right.
Q. And went back to school?
A. I went to school.
Q. You live here with your mother and father?
A. That is right. I have a family of my own.
Q. Yes. Is this your parents' home?
[fol. 49] A. That is right.
Q. Have you ever served as a juror in Dallas County?
A. No, I haven't.
Q. Do you know whether your father has ever served as a juror in Dallas County?
A. No. I really don't.
Q. What is your father's occupation?

23 - Jos. C. Garrett

24 - Oscar G. Woodward

25 - Herbert L. Shuptrine, Jr Farmer

26 - Herbert M. Miley Craig Fie

27 - Raymond D. Maples Farmer

(28) - Howard E. Fulford Farmer

29 - Glen Nix Salesman

(30) - J. P. Dumas Ex. Farmer

31 - Luke I. Phillips

(32) - Tom Waller Ex.

33 - Percy Huckabee

(34) - C. E. Rankin Gen. Mgr. Hand C

(Page 2

35 - C. T. (Jack) Burks Barber

(36) - E. W. McCullough, Jr. V.P.

	Rt 2	Lawrence Bros. Plant
	Rt 5, Selma	Southland Mower Co.
	Safford	Same
ld	Rt 6 Bx 39	
	Route 3, Selma	
	Plantersville, Ala.	
	Plantersville	
	Orrville, Ala.	[redacted]
	3000 Water	O'Brien Plg. Co.
	513 Pettus	Dry Cleaner
	3015 Roosevelt	Auto Repair
	321 King	Hohenberg Bros.
	Selmont	Hotel Albert Barber
	510 Dallas	Sou B ell Tel.

61 - Bennie Phillips	Chauffeur	1218 Washington	
62 - Lee A. Henderson		Selma, Route 6, Box 207	
63.- Lyle M. Smith	Farmer	Carlowville	Same
64 - Lester M. Yates		319 Lapsley	Sou Clothing & Hot.
65 - Rufus L. Ware	Clk.	Rt 3	Sears
(66) - Young Childers	Farmer	Rt 2, Box 214	Same
67 - W. Lorenzo Sinclair		320 King	Topper Bros.
68 - Hallie S. Chapman		Summerfield Road	Dixie Highway Expr.

A. He is a minister also.

Q. What is your church.

A. Mount Averett Baptist Church and True Vine Baptist Church.

Q. Are they in Dallas County?

A. No, one is in Lowndes.

Q. Where is the other?

A. Dallas County.

Q. Do you know any of your parishioners or any of your members who have served as jurors?

A. No, I don't.

Q. Do you know of any negro in your acquaintance who served on a grand jury or petit jury in this County?

A. No, I don't.

Q. Have you ever requested to be excused from jury service?

A. No, I haven't.

Q. Have you ever been convicted of a felony or crime involving moral turpitude?

A. No, sir.

Q. Do you drink or gamble?

A. No.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. You made a statement and I didn't catch your answer. Was it none of your parishioners had ever served or you didn't know? Which was it?

A. I didn't know.

Q. And the other question about any other negro ever served, your answer to that was you just didn't know?

A. I didn't know, correct.

Q. Do you know Roosevelt Dawson?

A. No, sir.

Mr. McLeod: That is all.

Attorney Hall: That is all.

[fol. 50] JAMES BLACK, A Witness called by Defendant on Motion, having been duly sworn, testified, as follows:

Direct examination.

By Attorney Hall:

Q. State your name, and occupation, please, sir, and present address?
A. James Black, logging, 1412 Hudson St.
Q. Selma, Alabama?
A. Yes, sir.
Q. That is in Dallas County, isn't it?
A. Yes.
Q. You are a negro, are you not?
A. Yes, sir.
Q. Were you born in Dallas County?
A. Lowndes County.
Q. Is that in Alabama?
A. Yes.
Q. How long have you lived in Dallas County?
A. Between twenty-eight and thirty years.
Q. Continuously?
A. Yes, sir.
Q. What do you do?
A. Logging.
Q. Logging?
A. That is right. Timber cutting.
Q. Timber cutting?
A. And hauling.
Q. You have trucks and tractors and things of that sort?
A. Yes, sir.
Q. How long have you been in that business?
A. About twenty-five years.
Q. Do you also own any farm land?
A. Timber land, yes, sir.
Q. Do you have farm land in Dallas County?
A. I don't have any farm land.
Q. You have a home here?
A. Yes.
Q. Do you own your own home in Dallas County?
A. Yes.

Q. How old are you?
A. Forty-nine.
[fol. 51] Q. Have you ever been convicted of a felony in this County?
A. No, sir.
Q. Have you ever served a term for more than a year in jail?
A. I never have.
Q. Have you been convicted of anything and given that term and given probation?
A. No.
Q. Are you a habitual drunkard?
A. No.
Q. Do you gamble or have you been arrested for gambling or loitering?
A. No, sir.
Q. Can you read and write?
A. Fairly good.
Q. The English language I mean?
A. Fairly good.
Q. Have you ever served as a juror in Dallas County, Alabama?
A. No, sir.
Q. Have you ever been called to serve as a juryman in this county?
A. No, sir.
Q. Do you have any friends, who, of your own knowledge, ever served on either a grand or petit jury in this County?
A. I wouldn't know. I wouldn't know of any.
Q. You don't know of any?
A. No, sir.
Q. Have you ever asked to be excused from serving on a jury in this County?
A. No, sir.
Q. Have you any serious ailment of any crippling disease that may prevent you from serving?
A. No, sir.
Q. As a juryman?
A. No.
Q. Where did you say you lived?
A. 1412 Hudson Street.

Q. That is not the downstown area of Selma, is it?
A. That is out on First.
Q. Within the municipal area of Selma?
A. Yes, sir.
Q. You have a large number of friends there around where you live, do you not?
A. Do I have a lot of friends?
Q. Yes, sir.
[fol. 52] A. Yes, sir.
Q. Do you know of any of them who served as a juryman?
A. No, sir.
Q. Do you belong to any fraternal organization, Elks, Masons or Pythians?
A. Mason.
Q. You are a Mason?
A. Yes.
Q. Do you know of any members of your Masonic lodge who have served as jurors?
A. No, sir.
Q. Have you been Master of your lodge?
A. No, sir.
Q. You know your present Master? How long have you known him?
A. Oh, twenty-five or thirty years.
Q. Do you know whether or not he has served as a juror in Dallas County?
A. No, sir.

Attorney Hall: That is all.

Cross examination.

By Mr. McLeod:

Q. You were asked if you ever knew of anyone who served as a grand of petit juror. Do you know what the difference is?
A. Well, I wouldn't know that.
Q. But you answered you never knew of anyone who served on a grand or petit jury. Did you know what you were answering when you answered that?
A. Maybe I misunderstood what he asked me.

Q. Have you known of negroes to be subpoenaed for jury duty?

A. I don't know.

Q. Do you come around to Court?

A. Not very much.

Q. You don't know what takes place around here?

A. Not too much.

Q. When you make the statement you didn't know, you never made an effort to find out what they were, did you?

A. No, sir.

Q. You are just talking about what somebody else told you, weren't you?

A. I have never—

Q. Do you take the Selma paper?

A. Yes, sir.

Q. Do you read the Selma paper?

A. Sometimes.

[fol. 53] Q. Did you ever pay attention to the list of jurors when it came out in the paper?

A. Not too much.

Q. Did you ever check them to see if any were negroes or not on the list?

A. No, sir, I haven't.

Q. There could have been a bunch of names in there who were negroes you didn't know them.

A. That is right.

Q. Do you know Roosevelt Dawson?

A. No, sir.

Q. Do you know Tom Waller?

A. That is the—

Q. Who runs a dry cleaning plant in town?

A. Yes, sir.

Q. You know him?

A. Yes, sir.

Q. Do you know he was subpoenaed for jury duty this week?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Do you know Percy Huekabee, who lives at 3015 Roosevelt, and works at the Auto Repair Shop, you know him?

A. Yes, sir.

Q. Did you know he was subpoenaed for jury duty this week?

A. No, sir.

Q. You didn't know that, did you?

A. No, sir.

Q. Do you know Young Childers, who is a farmer, and lives out on Route 2, you know him?

A. Know what?

Q. Young Childers?

A. No, sir.

Q. If he was subpoenaed and you saw that name, you wouldn't know whether he was a white man or negro, would you?

A. No, sir.

Q. Do you know Bennie Phillips?

A. Not personally I don't.

Q. For your information, he lives at 1218 Washington, you know him?

A. I wouldn't know him personally.

[fol. 54] Q. You have heard of him?

A. Yes, sir.

Q. You know he is a negro, don't you?

A. Yes, sir.

Q. Do you know he was subpoenaed for jury duty here this week and is serving on the jury here this week? Did you know that?

A. I didn't.

Q. So, there is 1, 2, 3, 4 negroes I called off their names, and you didn't know they had been called, did you?

A. No, sir.

Q. When you gave the answer "No" while ago, you didn't know of your own knowledge, did you?

A. Well, I may have answered the question—he said on the jury. My answer is I didn't. I didn't know.

Q. You didn't know?

A. No, sir.

Q. You didn't make an attempt to find out, did you?

A. No, sir, I haven't.

Q. You have never come around and checked and seen what takes place, is that right?

A. Yes, sir.

Q. Every time we have Court you don't come up and check how many negroes and how many whites are on the jury?

A. No, sir, I don't.

Mr. McLeod: That is all.

Redirect examination.

By Attorney Hall:

Q. Did you ever serve on any kind of jury?

A. No, sir.

Q. Petit, grand or otherwise?

A. No, sir.

Q. Do you know of your own knowledge any negro who has served on any kind of jury in this County?

A. I don't know any.

Q. Assume the four names Mr. McLeod read to you were subpoenaed in this cause, you don't know whether they served, you haven't seen them serve, have you?

A. No, sir.

Q. Tell me this: do you mean or the substance, as I understand from your testimony, did you know ordinarily of any large number of negroes doing jury duty in Selma? Or in Dallas County?

[fol. 55] A. Do I know anything about—

Q. Did you know if a large number—I will rephrase the question. Would you know if a large number of negroes had done jury duty over a number of years up here, would you know of it?

A. It seems like I would.

Attorney Hall: That is all.

Mr. McLeod: That is all.

Attorney Hall: May I approach Your Honor?

The Court: Yes.

(Thereupon, Attorney Hall went up to the bench.)

The Court: Come up here, Mr. McLeod.

(Thereupon, Mr. McLeod went up to the bench.)

The Court: It is stipulated by and between the Solicitor and counsel for the defendant that the 1950 Federal census

shows that there was 6,940 male white people over twenty-one years of age in Dallas County, Alabama, and that there were 7,956 male colored people over twenty one years of age in Dallas County.

Mr. McLeod: On that, it was male non-white.

The Court: All right. Male non-white, instead of male colored. That is the way it is stated here. Is that stipulated?

Attorney Hall: Yes, sir.

Mr. McLeod: Yes, sir.

Mr. Hall: That is all.

The Court: Do you rest?

Attorney Hall: Yes, sir, we rest.

The Court: Do you want a moment?

Mr. McLeod: Yes, sir.

The Court: We will take a five minutes recess.

(Thereupon, a short recess was had.)

The State Then Offered the Following Evidence Upon the Motion:

Terrell Hicks, A Witness called by State upon the Motion, having been duly sworn, testified, as follows:

Direct examination.

By Mr. McLeod:

Q. What is your name?

A. Terrell Hicks.

Q. Where do you live?

A. Selma, Alabama.

Q. What is your occupation?

A. Assistant Cashier of the Peoples Bank & Trust Company.

[fol. 56] Q. Have you ever served as a juror in Dallas County?

A. Yes, sir.

Q. Have you ever served on a grand jury?

A. Yes, sir.

Q. Do you recall when you served?

A. To the best of my knowledge January, 1954.

Q. Was there any negroes on the grand jury?

A. Yes, sir.
Q. How many?
A. One.
Q. Do you remember his name?
A. To the best of my knowledge Dawson.
Q. Could it have been Roosevelt Dawson?
A. It could have been.
Q. When other grand juries were in session did you ever make an effort to find out whether they were white or colored?
A. I have not.

Mr. McLeod: Your witness.

Cross examination.

By Attorney Hall:

Q. Is your home in Selma?
A. Yes.
Q. Was January 1954 the first time you served on a grand jury?
A. Yes.
Q. Had you served on any jury at all prior to that time?
A. To my knowledge I did not.
Q. Do you know of your own knowledge whether any other occasions since you have been in Dallas County where a negro has served on a grand or petit jury?
A. Not to my knowledge.
Q. But you do know one negro served in January, 1954?
A. Yes.

Attorney Hall: That is all.

Redirect examination.

By Mr. McLeod:

Q. I believed you testified while ago you never attempted to find out about other grand juries?
A. That is right.

Mr. McLeod: That is all.
Attorney Hall: That is all.

JAMES G. CLARK, A Witness called by State on Motion, having been duly sworn, testified, as follows:

[fol. 57] Direct examination.

By Mr. McLeod:

Q. What is your name?
A. James G. Clark.
Q. Are you Sheriff of Dallas County?
A. Yes, sir.
Q. How long have you been Sheriff of Dallas County?
A. Since November 8, 1955.
Q. Previous to that time, November 8, 1955, did you have much knowledge about courts of Dallas County, as to who was on the jury, type of cases, and things of that nature?
A. Almost none.
Q. Since November 8, 1955, is it your duty as Sheriff to see all subpoenas are served on people to come serve on juries?
A. It is.
Q. Since November 8, 1955, have you ever served subpoenas when there was not negroes on the jury?
A. Not to my knowledge.
Q. You did not?
A. I don't remember of any.
Q. And can you estimate the maximum number you have seen on the jury?
A. Well,—

The Court: On the whole venire?

Q. On the whole venire that were negroes.
A. I remember once it was six; one time two. It varied.
Q. And six is the highest number you can recall?
A. Yes. It could have been more.
Q. And the average number of jurors is around seventy?
A. Well, I say from sixty to seventy or sixty to ninety-five.
Q. And you don't find all of them?
A. No. We never have found them all.
Q. Are you familiar with the arrests of prisoners you have had in your jail there?

A. Yes, sir.

Q. Since November 8, 1955, when you became Sheriff, state the approximate percentage in your best knowledge have been negroes, negro prisoners and white prisoners?

Attorney Gray: We object, unless he shows the age.

Q. Over twenty-one years old?

A. I will say it has been above eighty-five per cent negro.

[fol. 58] Q. And that concludes all crimes?

A. All crimes.

Q. That leaves approximately fifteen per cent that are white. Are most of them Dallas Countians?

A. No. I would say a large percentage of them is from Chilton County and some from Craig Air Force Base.

Mr. McLeod: Your witness.

Cross examination.

By Attorney Hall:

Q. Mr. Clark, isn't it a fact that the number of jurors who are usually called on a regular venire is roughly a hundred?

A. No.

Q. Now, how do you get the average? Between 60 and 95 is your testimony a moment ago. What determines the number for a regular venire?

A. I am not sure. I don't arrive at that.

Q. I see.

But sometimes the total number is sixty. That includes those you serve and those who are not served?

A. I don't understand.

Q. You testified some persons you can't find?

A. That is right.

Q. What I was trying to get at is whether or not the persons you testified to as making up the venire from sixty to ninety-five members, included those you were able to find and those you were not able to find?

A. I will say this, the venire as we receive it sometimes has as many as sixty and sometimes as many as ninety-five, and the percent we can find out of that varies. Sometimes we find a large number. Sometimes we don't find so many.

Q. So far as you know there is no guaranteed number of veniremen?

A. No, there is not.

Q. Do you serve these subpoenas yourself or are they served by your deputies?

A. By both.

Q. You serve and they are served by your deputies?

A. Yes.

Q. When you testified a moment ago as to the percentage of arrests you have made since you became Sheriff, you meant eighty-five per cent of the total number of arrests you have made have been negroes?

A. That is an estimate. They have been.

Q. Would you say a large number of negroes you arrest are repeaters?

A. To some extent, yes.

[fol. 59] Q. What percentage would you say?

A. Well, it would be hard to say. I never tried to arrive at it.

Q. Using the same judgment you used in arriving at the percentage of negroes, would you give your best judgment of the number who are repeats?

A. I would say about the same percentage, number of negroes are repeats as the whites are repeats.

Q. What would you say?

A. I couldn't say. I never have gone into it from that angle.

Q. But a large number of your total arrests have been repeats?

A. Not a large percentage.

Q. Would you say a small percentage?

A. No. Prisoners, of course, arrested have been arrested for the first time. I haven't gone into it from that angle.

Q. Do you know of any of the negroes who constitute the eighty-five per cent of your total arrests who are regular visitors to your jail, say every six months or so?

A. Yes, I know some.

Q. There are some?

A. Yes.

Q. That would go into the totality of the eighty-five per cent, would they not?

A. I think so. I am judging from arrests we make from day to day.

Q. Would you as Sheriff of Dallas County say eighty-five per cent of the negro population are criminals?

A. What?

Q. Would you as Sheriff of this County say that eighty-five per cent of the total adult negro population are criminals?

A. I am speaking of arrests that we make.

Q. And that, of course, would include the repeats?

A. Yes, both white and colored.

Q. So you are not saying eighty-five per cent of the total negro population are criminals? You are not saying they are?

A. No; I am not.

Attorney Hall: That is all.

Mr. McLeod: Come down.

Captain Defke.

GLENN H. DEFKE, Recalled, testified, as follows: (Recalled by State)

Direct examination.

By Mr. McLeod:

Q. You have testified previously you are Chairman of the Jury Commission of this County?

[fol. 60] A. That is right.

Q. Where were you raised?

A. Colorado.

Q. Well, now, didn't you live at Martin's Station?

A. I lived there from 1919 up to 1946.

Q. And since you have lived in Alabama most of the time has been out at Martin's Station?

A. Martin's Station and Selma.

The Court: Is that in Dallas County?

The Witness: Yes, sir.

Q. Do you know of your own knowledge how many people at Martin's Station precinct, where you lived so long, are on the jury roll?

A. I do know, yes, sir.

Q. Is that the only one you absolutely know?

A. Yes. That is the only one I am positive on.

Q. How many people in that precinct are on the jury roll?

A. Seven.

Q. How many negroes?

A. Four.

Q. The other three are whites?

A. That is right.

Q. Now, Captain Defke, you stated while ago on the stand that you went around the county and did talk to people all over the County concerning prospective jurors?

A. Yes, sir.

Q. And when you did talk to them did you ask to find out if the person you were discussing had been convicted of crime?

A. That is one question we always ask.

Q. When you did go around and make these checks, can you give an estimate of the number you checked on—not the population—but of the number you checked on, what was the ratio between whites and colored who had been convicted of crime?

A. Oh, I would—it is not a positive figure, Mr. McLeod—I would say eight or ten to one in favor of the whites.

Q. Since you have been on this jury commission for four years have you ever refused to place a negro on a jury roll because he was a negro?

A. No.

Q. Isn't it one qualification for jurors he is to be able to exercise good judgment?

A. Good what?

[fol. 61] Q. Judgment?

A. That is right.

Q. Is that one thing you check on too?

A. Yes, sir.

Q. Have you got any idea what percentage you found on that as you were checking around the county?

Attorney Gray: We object to this, unless he can show he has some concrete method and standard which is generally accepted for determining whether a person has good judgment. That is a relative question.

The Court: I am afraid the question is objectionable, a comparison as to judgment.

Q. Captain, what is the policy of your Commission as to white preachers and white teachers, negro preachers and negro teachers?

A. To leave them out of the jury box. If there has ever been one put in, it was an oversight.

Q. On the list we have now was one man W. David Holloway, Plantersville, and it shows "Preacher & Teacher", did you know of your own knowledge when he was put on the list whether he was a preacher and teacher?

A. No, sir, I did not.

Q. And is it your policy to leave them both out?

A. Yes.

Q. Of both races?

A. Yes.

Cross examination.

By Attorney Hall:

Q. When you go to the precincts looking for new jurors, do you talk to white and colored persons?

A. I do.

Q. Do you go to their homes or have some central place you meet them?

A. No, I wouldn't want to say I go to their homes. It wouldn't be that important to make a trip to interview someone about putting someone in the jury box. We pass around stores and gathering places, but never go to anyone's home to see anybody about putting somebody in the box.

Q. How do you do it?

A. As I said before, for instance, I go to Orrville. I know several good men out there, and ask about folks, and get more than one man's opinion.

Q. You ask about colored. Do you ask colored and white people at Orrville?

A. I do.

Q. Do you know all the negroes in all the precincts in Dallas County?

A. No. I do not believe anybody does.

[fol. 62] Q. What do you do about the precincts where you don't know the negroes?

A. Ask some good white man.

Q. And they in turn suggest names?

A. Yes.

Q. Would you say you rely mostly on what you get from good white men in their precincts in determining your jurors?

A. Well, I would say what I get all together about white men, but non-white, I talk to some good folks in the country and some here in town.

The Court: You mean good citizens in town?

A. Yes, about non-whites. I know good citizens I talk to and advise about some of the folks to be put in the box and some left out.

Q. Have you talked to negroes in Selma about prospective jurors?

A. I have.

Q. Would you remember the names of negroes readily you have talked with here in Selma?

A. I could remember names, but I wouldn't want to divulge it, because they might be embarrassed by that question. I don't think that would be a good idea to reveal names.

Q. I understood you answer to Mr. McLeod's question with reference to both side as to the exclusion was all preachers and teachers. What determines the Board's policy along that line?

A. I believe the State Code says that teachers are eligible to serve when they are not really engaged in the pursuit of teaching school, eligible for jury service. We try to leave them out because the biggest part of the year they are working.

Q. You understand when not teaching they are eligible?

A. That is right.

Q. Assuming they are eligible and they ask for it, would you then include them?

A. I never have had one ask to be put in.

Q. You understand the fact there are some persons on the reel whose profession is that of teacher or preacher?

A. I didn't know it until while ago when Mr. McLeod called that to my attention. That was an oversight.

Q. But there are no negro preachers or teachers on the jury reel, you are aware of that?

A. I don't know of any, no.

Q. Isn't it true you are familiar with the provision of the Code dealing with the qualifications of prospective jurors? [fol. 63] A. I wouldn't say familiar. I have read it a few times.

Q. Isn't it a fact the statute does not exclude preachers or teachers from serving on a jury? Isn't that true?

A. I think it is, except, as I said before, if I remember correctly, teachers are excused when school is in session or going on.

Q. Well, are conductors excused too?

A. Yes, they are.

Q. Bus drivers?

A. They are.

Q. Truck drivers, boatmen. As a matter of fact, there about fifty categories who may be excused set out in the Code?

A. I don't remember them.

Q. But you do have railroad men conductors and switchmen who serve on juries in Dallas County, do you not?

A. Not knowingly, no.

Q. Air plane pilots, and others.

Attorney Hall: That is all.

Redirect examination.

By Mr. McLeod:

Q. This roll you testified you keep and cards you keep, is there any way you can look at those cards, and unless you know that person personally, can you tell whether it is a negro or white man?

A. You certainly cannot. There is no identification as to race put on the cards at all.

Mr. McLeod: That is all.

Attorney Hall: That is all.

LIEUTENANT P. L. PYRON, A Witness called by State, on Motion, having been duly sworn, testified, as follows:

Direct examination.

By Mr. McLeod:

Q. Is your name P. L. Pyron?
A. Yes.
Q. What is your occupation?
A. Police officer.
Q. How long have you been with the City of Selma Police Department?
A. Eighteen years.
Q. In what capacity?
A. Lieutenant.
Q. For the past year, we will confine it to a year, what percent of your arrests, we will say of people over 21 years of age, that are negroes and what percentage of whites are your arrests?

[fol. 64] Attorney Gray: Unless he can first establish the basis upon which he is to give that percentage, we object, and we believe the best evidence of that would be to bring to Court and introduce in evidence the police records.

The Court: You are asking for his judgment?

Mr. McLeod: Yes, sir, his best judgment.

The Court: I overrule the objection.

Attorney Gray: We except.

The Court: Do you have a judgment? Do you have an opinion?

The Witness: Yes, sir.

The Court: Answer the question.

The Witness: Yes, sir.

Attorney Hall: May I ask the Court to qualify him as an expert to give or express an opinion?

The Court: No; I am not qualifying him as an expert. I wanted to see if he had a judgment.

Attorney Hall: We don't object tc the testimony if they qualify him as an expert and show the foundation upon which he is expressing whatever opinion he has.

The Court: You had better qualify him

Q. Is every arrest that is made here in the City of Selma, is a list made of that every day and turned over to you the next day so you can see everybody who has been arrested that day before, and does that list show whether colored or white?

A. Yes, sir.

Q. And do you look at that list every day you are on duty?

A. Yes, sir.

Q. Do you have, from seeing the list every day, do you consider yourself capable of, from a study of that to give the percentage of how many of those arrests were white and how many colored?

A. I do.

Q. What is the percentage of the arrests that are colored and what are white?

A. Well,—

Attorney Hall: We object to him answering, unless it can be shown there is a connection between the arrests and subsequent convictions. The arrest itself is irrelevant and immaterial. It would tend to prove nothing, unless it can be shown this officer knew of the conviction following such arrest.

The Court: Overruled.

Attorney Hall: We would like to take an exception.

[fol. 65] Q. Answer the question.

A. I would say seventy-five to eighty per cent are negroes.

Mr. McLeod: Your Witness.

Cross examination.

Q. Do you have that list? Do you have them on file down there?

A. We do.

Q. Do you have them with you?

A. No.

Q. Do you know what percentage of those persons you testified were arrested which constitute seventy-five per cent negroes, were repeaters?

A. You mean—how is that now?

Q. You know what repeaters are? How many of that

seventy-five per cent were repeaters, week to week, month to month, year to year?

A. Uh—

The Court: He means had been arrested before.

Q. Yes, sir, arrested every once in a while.

A. Well, in my opinion I would say possibly maybe twenty-five per cent, maybe would be repeaters.

Q. I see.

Of that totality of seventy-five per cent you have a constant turn over of twenty-five per cent?

A. About that.

Q. Your figure, would it indicate seventy-five per cent of the negro population of the municipality of Selma were criminal? Would it?

A. I would not say they are all criminals, no.

Q. Lieutenant, does the Police Department of the City of Selma have jurisdiction over felonies, persons committing felonies?

A. We do.

Q. Are most of the persons you referred to in the seventy-five per cent persons who committed misdemeanors or felonies?

A. That includes all arrests, felonies, misdemeanors, and also traffic.

Q. Would you say traffic violations were a larger portion of that seventy-five per cent?

A. Well, I would say fifteen or twenty per cent probably would be traffic.

Q. And it also includes other petty crimes, classified as misdemeanors, does it not?

A. That includes all the arrests.

Attorney Hall: That is all.

Mr. McLeod: Come down.

The State rests, Your Honor.

[fol. 66] The Court: You rest?

Mr. McLeod: Yes, sir.

Attorney Hall: If Your Honor please, the defendant does not choose to argue the point.

The Court: All right.

Do you want to argue it, Mr. McLeod?

Mr. McLeod: No, sir.

The Court: The Court will overrule the motion to quash the indictment.

Attorney Hall: We would like an exception noted.

The Court: We will give you an exception. I will put it in the minute entry.

Attorney Hall: We have several motions. If we have an agreement, the same thing will apply.

The Court: Is this the same as the other?

Attorney Gray: No, sir. It is a motion to quash the venire.

The Court: On the motion to quash the venire, what is the statement?

Attorney Hall: We would offer the same testimony, that part that might be pertinent, those witnesses testimony to methods of getting up the venire,

The Court: You offer the same testimony on this motion?

Attorney Hall: Yes, sir.

The Court: As you had on the motion to quash the indictment?

Attorney Hall: Yes, sir. It would be cumulative.

The Court: Mr. McLeod, do you want to offer testimony?

Mr. McLeod: I am reading this, Your Honor. There may be one fact I want to put evidence up on.

The Court: All right.

I thought that looked like almost the same thing. This is not self-proving.

Mr. McLeod: He said he wanted to let whatever testimony was pertinent from the other testimony apply to this.

Attorney Hall: We just wouldn't offer any more testimony.

Mr. McLeod: I think there are one or two things we will have to put up testimony on.

Attorney Hall: Maybe we can get together on it. (Mr. McLeod and Attorney Hall conferred.)

The Court: Are you ready to submit it, Mr. McLeod?

Mr. McLeod: Yes, sir.

The Court: He has introduced in evidence here testimony [fol. 67] they took. Do you also introduce the testimony you took?

Mr. McLeod: Yes, sir.

The Court: Now, that was testimony which was given on the motion to quash the indictment, it is now offered in evidence in support of the motion and against the motion to quash the venire. As I understand it that is what you do, is it not?

Mr. McLeod: Yes, sir.

Attorney Hall: Yes, sir.

The Court: Are both sides offering that testimony?

Attorney Hall: Yes, sir.

Mr. McLeod: Yes, sir.

The Court: Do you have any statement you want to make?

Attorney Hall: No statement, Your Honor.

The Court: Do you?

Mr. McLeod: No, sir.

The Court: The motion to quash the venire is overruled; and I give you an exception in the minute entries.

Attorney Hall: That will conclude our preliminary motions.

The Court: Are you ready to plead?

Attorney Hall: Yes, sir.

The Court: How does the Defendant plead?

Attorney Hall: Not guilty.

The Court: Not guilty.

We will be ready in the morning to qualify the jury to start out with.

Attorney Hall: Your Honor, may I approach the bench?

The Court: Yes.

(The attorneys conferred with the Court at the bench.)

The Court: We will recess until 9:30 in the morning.

February 27, 1959, At 9:30, a. m.

Court reconvened on February 27, 1959, at 9:30 a. m., and the following proceedings were had:

The Court: Is the State ready?
Mr. McLeod: The State is ready, Your Honor.
The Court: Is the defense ready?
Attorney Gray: The defense is ready, Your Honor.
The Court: I think to be sure we ought to call the jurors names again. (The venire was called.)
The Court: We will qualify the jury at this time. Do you want the other attorney here with you?
[fol. 68] Attorney Gray: No, sir.
The Court: You are willing to proceed without him?
Attorney Gray: We are, Your Honor.

Thereupon, the Court Qualified the Venire Upon Their Qualifications to Try the Case at Bar.

The Court: What says the State? Are you satisfied with the qualifications of the jury?
Mr. McLeod: Yes, sir. The State is satisfied, Your Honor.
The Court: Are you satisfied with the qualifications of the jury?
Attorney Gray: Yes, sir.
The Court: All right.
Strike the jury.

Thereupon, the Jury to Try the Case Was Selected: Was Called Around, and Took Places in the Jury Box.

(Attorney Gray handed a paper to the Court and a paper to Mr. McLeod.)

Mr. McLeod: I would like to make a statement for the record, Your Honor.
The Court: Wait a minute. Let's don't make it right at this point. If we are going to get into this motion, I think out of an abundance of precaution—do you want the jury excused?
Attorney Gray: Yes, sir.
The Court: The defenses asks the jury be excluded. I grant that request. You gentlemen of the jury go out with the Bailiff. Don't discuss this case.

(Thereupon, the jury left the court room.)

The Court: Let's see if I understand this motion. You attorneys give me your attention. You make a motion here, let's see what you do ask, Comes the Defendant in the above cause and moves the Court to declare void and illegal the composition of the particular jury selected to try this case. Well, have you made some effort to verify this motion? Let me see if I understand what you are trying to get at with these grounds. Do these grounds make any claim that you haven't been furnished a full list of venire to strike from?

Attorney Gray: No, sir.

The Court: You make no such claim as that?

Attorney Gray: No, sir.

The Court: Do you make any claim in either of the grounds there has been any arbitrary conduct in this Court, so far as this venire is concerned, that arbitrarily excluded any negro that might be on this venire from serving in this —on this jury?

Attorney Hall: No, sir.

[fol. 69] The Court: You are not contending anything has happened since we got to the background of this motion?

Attorney Hall: No, sir.

The Court: As I understand, you just simply say you don't think there was enough negroes in the jury box or some reason connected with the jury roll or jury box?

Attorney Hall: Yes, sir.

The Court: Do you make a contention in the motion there was any fraud?

Attorney Hall: No, sir.

The Court: Or Arbitrariness on the part of the Court or anybody in drawing the venire?

Attorney Hall: No, sir, absolutely not.

The Court: No contention along that line. What you state to the Court what you are basing your motion on, regardless of how you stated the grounds, what you base your motion on, regardless of how the grounds may be stated—some of them are in rather general terms—that you are not claiming anything at all wrong with what we have done here in Court?

Attorney Hall: No, sir. There has been absolutely nothing. We claim there has been absolutely nothing wrong in

Court in arranging the particular jury. This is a followup on the other motion.

The Court: So far as the jury summonsed to try these cases for this week of Court, this defendant has been treated fairly?

Attorney Hall: So far as this Court is concerned, yes, sir, absolutely.

The Court: What do you say, Mr. McLeod?

Mr. McLeod: I want to make a statement. That is the fact negroes were drawn, summonsed and did appear in the court room and the State of Alabama did not strike all off this jury list. The defense struck part of them.

The Court: All right.

Attorney Billingsley: I don't quite understand what Mr. McLeod is saying. As said before, our contention is relative to the motion filed yesterday. We contend so far as the present motion is concerned, it was upon the evidence yesterday. There was some negroes on the jury and the State struck them.

Mr. McLeod: I beg your pardon. We will tell you; you struck number 22. You recall that, don't you?

Mrs. Houston: Yes, sir.

Mr. McLeod: I may have the number wrong.

Attorney Billingsley: Am I right the State struck two negroes? Well, I am contending with the small number— [fol. 70] Mr. McLeod: Your Honor, I will apologize to the Court. I had it down number 22 was—I apologize, and withdraw everything I said with reference to that. I apologize to the Court.

The Court: All right.

Mr. McLeod: I had it entered as one.

The Court: Are you ready for this motion to be submitted to the Court?

Mr. McLeod: Yes, sir.

Attorney Hall: Yes, sir.

The Court: The Court will overrule the motion.

Attorney Billingsley: Give us an exception, Your Honor.

The Court: All right.

* * * * * * *

[fol. 209]

THE ALABAMA COURT OF APPEALS

LEWIS LLOYD ANDERSON

v.

STATE

Appeal from Dallas Circuit Court

March 10, 1959 Certificate Filed

June 30, 1959 Transcript Filed

October 29, 1959

Come the parties by attorneys, and argue and submit this cause for decision.

JUDGMENT—November 10, 1959

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this Court and of the Circuit Court.

[fol. 210]

ALABAMA COURT OF APPEALS

LEWIS LLOYD ANDERSON

v.

STATE

Appeal from Dallas Circuit Court

OPINION—November 10, 1959

CATES, Judge

Anderson has appealed his conviction of first degree manslaughter. The verdict also carried ten years' imprisonment.

The first principal point relates to the sufficiency of the evidence, and whether two witnesses were competent to testify as to the speed of an automobile.

[fol. 211] A second question is grounded on the allegation that, in Dallas County, Alabama, there was, at the time of indictment (January 29, 1959) and the time of trial (February 27, 1959), a systematic exclusion of Negroes from juries with a consequent denial to Anderson, a Negro, of the equal protection of the law guaranteed him under the State Constitution and under the Fourteenth Amendment to the Constitution of the United States.

Viewed from the verdict (as we must take the facts on appeal, *Jones v. State*, 33 Ala. App. 451, 34 So. 2d 483), the case made by the prosecution was as follows:

On January 20, 1959, prosecution witnesses saw Anderson driving a car along Minter Street in Selma headed east. His speed was between sixty and seventy miles per hour.[1]

Minter was an unpaved street in a well populated residential neighborhood. The defendant testified the weather

[1] One witness judged that Anderson's speed was about sixty or seventy miles per hour; another stated he was traveling pretty fast; a third, the driver of the Chevrolet, said sixty-five or seventy. The speed limit at the collision corner was fifteen miles per hour.

was "damp" and that Minter "is a somewhat of a bad street most of the time but whenever it rains it is a somewhat of a deplorable condition for driving."

When Anderson got to the corner of Church Street, he ran into the front bumper and hood of a green Chevrolet headed north on Church, which had stopped on the south edge of the intersection. The impact spun the Chevrolet to its right 180 degrees from its first heading.

Forward momentum took Anderson's car down Minter Street. It swung first to the right (i. e., to the south side of the street), then caromed to the left off some stone blocks [fol. 212] on the north edge of the carriageway. As it began to swing again to the right, it hit Tom Reese ([redacted]) who was walking across (or had just crossed) the street and had got at least beyond the middle of the left lane of traffic.[2] The car carried Reese along on its hood for several feet, then after he fell off, it ran over him, all the while swerving again to the right or south side of the street. Then back in the road again, it went on to the end of the block where it hit a tree, bounced four feet in the air and turned over.

Reese had both arms and his left leg broken, an open wound ran around his abdomen from his right side and his intestines were outside.

Anderson was indicted for second degree murder. The true bill acted also as a charge of voluntary and involuntary manslaughter.

The defense was to the effect that Anderson had driven all along Minter Street at a moderate speed. He testified he was crossing Church Street at fifteen miles per hour when the Chevrolet driven by Mike Howard came at him. He recalled no more of the happening.

Anderson's physician testified the wreck had caused traumatic retrograde amnesia. The defense implied Anderson probably pressed on the accelerator while he was unconscious.

The State's showing Anderson's driving at high speed on a damp unpaved (and seemingly slick surfaced) street in a well populated area, hitting and running over a pedes-

[2] L. B. Hunter, an eyewitness, said Reese was on the north edge of the roadway alongside the footpath. He further testified the force took Reese out of his shoes.

[fol. 213] trian in the left lane of travel, and the circumstance of the distance of some 396 feet his car went forward after an apparently violent collision, together with the force of its bounce when it hit the tree, made out a prima facie case of that appreciated disregard of the results of wanton conduct from which death ensues, which is one definition of voluntary manslaughter.

Intent to kill is but an alternative ingredient: the same state of mind can be imputed from conduct wanton and reckless toward human life. The likelihood of another's being imperiled by the wanton conduct, no less than actual knowledge, makes for culpability, thus supplying mens rea in voluntary manslaughter. *Rainey* v. *State*, 245 Ala. 458, 17 So. 2d 687; *Gills* v. *State*, 35 Ala. App. 119, 45 So. 2d 44. "Wantonness may be predicated upon conduct occurring before a discovery of the peril. * * * " Lawson, J., in *Buchanan* v. *Vaughn*, 260 Ala. 482, 71 So. 2d 56.

Anderson has cited a number of civil and criminal decisions for the proposition that, for a killing to be first degree manslaughter, where there is no direct evidence that the act was done wilfully, the State must show it was done with consciousness that injury would probably result from the act, and such knowledge cannot be implied from the knowledge of danger, rather there must be a "design" to do wrong, or a reckless indifference or disregard of natural consequences of the act done. We have carefully considered these cases and have noted discussions of them in decisions as late as *Nixon* v. *State*, 268 Ala. 101, 105 So. 2d 349 (a murder case), and *Smith* v. *State*, —— Ala. App. —— 109 So. 2d 853.

We have concluded that the *Rainey* case, supra, is still the law and represents a re-examination and a refinement [fol. 214] in the law of manslaughter, and one which this court and the lower court are constrained to follow.

Moreover, we consider the *Rainey* case to be the natural and correct corollary of the principles theretofore developed as to what may evidence intent in voluntary manslaughter. The two following quotations, we believe, will illustrate this development:

> "It is insisted on motion for new trial that there is no evidence of an intent to kill, and, in the absence of such

evidence, the defendant cannot be convicted of manslaughter in the first degree. The law governing homicide is not so narrow. If a person knowingly and consciously drives a high-powered automobile at an excessive rate of speed along the public highway, where other vehicles and pedestrians are liable to be and the driver's vision is obstructed by clouds of dust and the sun is shining in his face, and at a point where he must pass a road machine which takes up at least half the road and death results to a pedestrian walking along the highway, a jury would be justified in finding that the offense was manslaughter in the first degree * * * "
—*Reynolds* v. *State*, 24 Ala. App. 249, 134 So. 815.

"Without an intent to kill there can be no murder, or manslaughter in the first degree. (Citing case.) It is not required that there be a positive or specific intent to kill to constitute manslaughter in the first degree. (Citing cases.) This for the reason that where an accused's conduct or act of violence which ordinarily in the usual course of events would result in death or great bodily harm to another, and a death does result, the accused must be deemed to intend the probable results of such act, i. e., that he intended to kill. * * * "
—*Smith* v. *State*, supra.

The statement in the *Rainey* case has been expressly quoted with approval in the following criminal appeals: *Clayton* v. *State*, 36 Ala. App. 175, 54 So. 2d 719 (pistol killing); *Harris* v. *State*, 36 Ala. App. 620, 61 So. 2d 769 (automobile manslaughter); *Hanby* v. *State*, 39 Ala. App. 392, 101 So. 2d 553 (automobile manslaughter).

[fol. 215] Whether or not a motorist has amnesia when striking a pedestrian is ordinarily not a matter to be determined by his testimony alone; rather it is a jury question. *People* v. *Henry*, 23 Cal. App. 2d 155, 72 P. 2d 915. So that, while certain defense witnesses may not have seen Anderson steering his car, the testimony of State witnesses that they did see him, coupled with the presumption of continuity arising from the undisputed fact that he was the driver at the time of the collision, made out a jury question.

Had there been a both-to-blame collision, Reese's death could be laid to Anderson. The cause and effect question under the theory of the defense could still have supported the verdict had the jury chosen to believe that Anderson was driving sixty to seventy miles per hour. Howard's contributory negligence would not absolve Anderson. *Hanby v. State*, 39 Ala. App. 392, 101 So. 2d 553.

Therefore, we consider that, as a matter of law, the trial judge properly overruled Anderson's motion (made when the State rested) to exclude the evidence. After both sides rested, the defense took no exception to the oral charge, nor did it move for any charge affirmative as to either first or second degree manslaughter. The trial judge charged murder out, both in writing and in his oral direction.

The State produced two witnesses, Frank L. DuBose and Peter Wolff, who were standing on the corner of Minter and Mabry and saw Anderson driving "pretty fast," and that he ran into a stopped car, zigzagged across the street, and hit a tree and turned over. Neither witness noticed the car striking Reese.

[fol. 216] Both at the trial and on appeal, a great deal has been made of the lack of testimonial qualifications of these witnesses as competent to express judgment on the speed of Anderson's car. The State brought out that the witnesses had ridden in automobiles. Although neither of them could drive, each had watched speedometers while riding and had seen traffic along city streets. Excerpts from their testimony appear below.[3]

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[3] DuBose on direct: "Q. And how was he traveling? A. He was going pretty fast. Q. What kind of car?, Was he in a car, or what? A. He was in a car. Q. A car. You know how to drive a car, don't you? A. No, sir. Q. You have been riding in cars, have you not? A. Taxis. Q. Taxis. And you have noticed the speedometer and things of that nature, didn't you? A. Yes, sir. Q. And can you estimate from your knowledge of automobiles and riding in them, can you estimate the speed an automobile is traveling? A. Riding I can. Riding in them, I mean. Q. When you look at an automobile and see it traveling can you from your knowledge of the speed of cars, can you estimate the approximate speed that car is traveling when you see it go by? A. Yes, sir."

Wolff on direct: "Q. Did you ever look at the speedometer to see how fast they were going? A. Yes, sir. Q. How long have you

[fol. 217] The rule of our decisions is that the speed of an accustomed object is a subject largely of common observation rather than reserved for expert opinion.

As stated in *Vredenburgh Saw Mill Co.* v. *Black*, 251 Ala. 302, 37 So. 2d 212:

> "It is well settled that the average witness does not have to have expert knowledge to testify as to the speed of a vehicle in ordinary or common use. The fact that the witness McKinley had never driven a truck or automobile did not disqualify him from giving testimony as to the speed of the truck. The credibility of the testimony was for the jury."

See also *Williams* v. *Roche Undertaking Co.*, 255 Ala. 56, 49 So. 2d 902.

We consider whatever deficiencies existed in the testimony of these two witnesses were matters of weight and credibility rather than competency.

A further question arose by way of objection to the testimony of the coroner of Dallas County who was not a physician. The objection went to his expressing an opinion as to whether or not the wounds suffered by Reese probably caused his death.

The State brought out that the coroner had observed some seventy-five or more bodies of persons killed by being struck by automobiles. Whether or not this was sufficient

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been riding in cars? A. I couldn't really tell you. Q. Well, all your life so far as you know? A. Yes, sir. Q. And you have always paid attention to speedometers, have you? A. Yes, sir. • • • Q. Did you watch him when he went by you? A. Yes, sir. Q. Do you have an opinion as to how fast he was driving? Attorney Hall: We object. There is no proper predicate laid. He is not qualified. The Court: I overrule the objection. He is not asking how fast; but he wants to know if you have an opinion. Overruled. Attorney Hall: We except. The Court: Read the question. (Thereupon, the Reporter read the last question propounded to the witness.) Q. Do you have an opinion, yes or no. A. No, I don't. Q. You did see the car? A. Sixty or seventy. Q. Did you watch him go on down the road until this wreck took place? A. Yes. Q. At the time the accident occurred with the green car, was he driving approximately the same rate of speed when he hit that car as when he passed by you? A. Yes, sir."

qualification is largely addressed to the sound discretion of the trial judge. In view of the full description of Reese's injuries, we need not go into whether or not the admission of the coroner's testimony over objection was an abuse of the trial judge's discretion, for the circumstances and description of Reese's being hit by Anderson's automobile and the details of his injuries constituted sufficient undisputed evidence from which the jury could have reasonably in- [fol. 218] ferred that the collision caused his death. This result could have been reached without expert testimony.

In *Eubanks* v. *Louisiana*, 365 U. S. 584, 2 L. Ed. 2d 991, 78 S. Ct. 970, Mr. Justice Black's opinion begins:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. * * * "

Appended to this statement is a footnote which contains a number of decisions theretofore rendered by the Supreme Court of the United States on the question. Three of them, in which Texas was the respondent (*Smith*, 311 U. S. 128; *Hill*, 316 U. S. 400; *Cassell*, 339 U. S. 282), provide a reasonably good cross section of systems that have been scrutinized.

In this case we are confronted with what is charged to be a scheme in Dallas County, Alabama, to systematically exclude Negroes from juries, both on grand and petit juries solely because of their being Negroes.

Anderson moved (1) to quash the indictment, (2) to quash the petit jury venire, and (3) to declare void the composition of the jury sworn to try him.

We begin our enquiry by taking notice of the opinion of Mr. Justice Foster, then supernumerary, in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303 (reversed on another ground, 352 U. S. 191).

We refer to the *Fikes* opinion for two reasons. First, to call attention to the fact that the jury commission of

Dallas county made up a new roll of jurors in October, 1953, so that no exclusion before that date would have any rele-
[fol. 219] vancy here. Second, we consider the opinion for the following finding as to the make up of the jury roll in October of 1953:

> "• • • The commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, and from which the venire was drawn which furnished the grand jury and petit juries here involved. There was nothing on the roll or cards which indicated their race. • • • "

The revision of the jury roll required to be made by statute every year consists primarily of adding names of men newly qualified, and the deletion of those who have died, become disqualified, or come under a statutory exemption. So that the annual book or roll carries over a great many names from a prior year. Therefore, we feel warranted in approaching this question in a case tried some five years after the Fikes trial in relying upon the finding of our Supreme Court in that case as an established foundation.

Moreover, the movant in such a situation carries the burden of proof to adduce enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude.

We begin (also referring to the *Fikes* opinion) with some of our jury statutes.

Code 1940, T. 30, § 21, as amended, gives the basic qualifications of jurors: (1) Sex: male; (2) age: 21-65; (3) general: generally reputed to be honest and intelligent • • • and esteemed in the community for their integrity, good character and sound judgment; (4) specific exclusions: (a) under age; (b) habitual drunkard; (c) afflicted with permanent disease or physical weakness rendering him unfit; (d) cannot read English—except freeholder or house-
holder; (e) *ever* convicted of an offense involving moral [fol. 220] turpitude. Note: This disqualification is not confined to felons nor to misdemeanants: "offense" includes breaches of ordinances where the substance of the charge

involves moral turpitude. Cf. *Beasley* v. *State*, 39 Ala. App. 182, 96 So. 2d 693 (adultery).

Code 1940, T. 30, § 24, requires the jury commission to seek out men so qualified and put their names on the jury roll and in the jury box.

Code 1940, T. 30, § 28, requires the commission to note disqualifications or exemptions opposite the names of those theretofore on the roll.

Code 1940, T. 30, § 3, as amended, exempts: (1) Judges; (2) attorneys; (3) officers of the United States; (4) officers of the executive department of the state government; (5) sheriffs; (6) deputies; (7) clerks of the courts; (8) county commissioners; (9) physicians; (10) dentists; (11) pharmacists; (12) optometrists; (13) teachers; (14) actuaries; (15) engineers of boats; (16) bus drivers (under Public Service Commission); (17) truck drivers (under Public Service Commission); (18) railroad engineers; (19) firemen; (20) conductors; (21) train dispatchers; (22) bus dispatchers; (23) railroad station agents; (24) telegraph operators; (25) newspaper reporters; (26) embalmers; (27) radio broadcasting engineers and announcers; (28) superintendents, physicians, and regular employees of Bryce and Searcy Hospitals; (29) officers and enlisted men of the national guard and naval militia; (30) and convict and prison guards.

Moreover, the jury commissioners have discretion to exclude men who would be subject to challenge either by statute or by common law for general grounds (aside from those arising from the peculiarities of a given suit, e.g., consanguinity or being a witness).

[fol. 221] The statutory grounds of challenge which should keep a man's name from the roll are (Code 1940, T. 30, § 55, as amended):

"1. That the person has not been a resident householder or freeholder of the county for the last preceding year.

"2. That he is not a citizen of Alabama.

• • • • • • •

"5. That he has been convicted of a felony.

• • • • • • •

"8. That he is under twenty-one, or over sixty-five years of age.

"9. That he is of unsound mind."

In *Brown* v. *Woolverton*, 219 Ala. 112, 121 So. 404, 64 A. L. R. 640, we find:

"• • • The common-law grounds as far as applicable to our system and not changed by statute remain for our guidance. Our statute has added certain grounds of challenge for cause, buf they are not exclusive of the common law remaining unchanged. • • • "

Pardon of an infamous offense does not remove the ground for challenge. *Brown* v. *Crashaw*, 2 Bulstr. 154; *Terry* v. *State*, 25 Ala. App. 135, 148 So. 157, holds that a pardon will not cut off enquiry as to a witness's conviction of a crime involving moral turpitude. See also *Mason* v. *State*, 39 Ala. App. 1, 103 So. 2d 337, affirmed 267 Ala. 507, 103 So. 2d 341.

When drawing a venire either for a grand or petit jury, the circuit judge pulls "without selection," i.e., blindly, cards with the jurors' names for the venire list to be summoned by the sheriff. The names of those who appear and are not excused from grand jury duty are drawn in open court from a hat or box. The first eighteen men so picked are the grand jury. Code 1940, T. 30, §§ 30 and 38.

Our statutes require that the cards that go into the jury wheel or box be white, all of the same size and texture. [fol. 222] The only writing is the name, occupation, residence and place of business. Code 1940, T. 30, § 20, as amended.

It should be pointed out that no evidence is shown of any violation of any of these or related statutes.

First, Anderson adduced the testimony of the circuit solicitor who had been in office since August, 1954, and who attended the organization of grand juries in Dallas County twice a year. No Negroes had served on grand juries during that time. He had met court in Dallas County four times a year. Each and every venire from which both grand and petit jurors were selected contained a number of Negroes.

The solicitor recalled one case in which all of the Negroes on the venire requested the judge to excuse them. These excuses were granted, with the consequence that their withdrawal left no names of Negroes on the list.

On other occasions when grand juries were drawn, there were Negroes still left on the venire and their names were placed in the hat from which the grand jury was drawn.

Each venire contained an average maximum of seven or eight Negroes, with the normal total of the venire being around seventy summoned, less those who were not found by the sheriff.

On the present venire there were a number of Negroes, one of whom claimed exemption for over age; another, named Tom Waller, was drawn but had to be excused because of an attack; a third was excused on account of illness; and two more were left on.

The circuit clerk was called as a witness, and on cross-examination stated that Negroes had been drawn every session of court since she began as clerk. She further testi- [fol. 223] fied that there was nothing on the cards drawn from the jury box to show whether the juror was black or white.

The secretary of the jury commission testified her duties were to type up the jury roll as it was given to her, type up the jury cards, write the commission minutes, and post the venire to the jury roll. She had no contact with the venire at all. The jurors were just names to her and there was no way to ascertain from their employment or addresses, so far as she knew, as to their being black or white. Asked if she knew whether or not Negroes served on any grand jury since she went into her position in September, 1954, her answer was, "Not that I know of." However, it was not brought out that she had knowledge of who did or did not serve on grand juries.

The deputy solicitor was put on the stand and testified that he had been solicitor for "as many as ten, fifteen or twenty" years. During that period of time, he had known of a Negro *serving* once or twice in Dallas County. He stated that none had served in the last three years, including the grand jury which indicted Anderson. On cross-examination he stated that in approximately 1953 or the

early part of 1954 there was a Negro who served on the jury at that time.

Anderson took the stand to show that he was a citizen of the city of Selma, Dallas County, Alabama, in the United States.

William H. Dinkins testified he had been a resident of Dallas County since 1894, except when he was in school and in the army. He attended Selma University and Brown University, from which he obtained a B. A. degree. Colum- [fol. 224] bia University conferred upon him a Master of Arts degree. He was a member of Phi Beta Kappa.

Dinkins had never been convicted of any crime in Dallas County, and had never served a penal term in Dallas County. When asked if he had any personal knowledge of any Negroes serving on a jury in Dallas County, he answered, "I don't know anything about grand juries." He was then asked whether he knew of any Negro who had served on the grand jury in Dallas County, to which he answered, "No, sir." A like question as to petit juries was asked, to which he replied, "No." He further testified that he had never served on a grand or petit jury in Dallas County, nor had he had any occasion of being excused from serving on a venire.

On cross-examination it was brought out that Dinkins was, at the time of the hearing, over age as a juror, aged sixty-eight and a half, and prior to that time had been a school teacher, hence exempt from jury duty under § 3, as amended, supra, at least while teaching.

The solicitor brought out that Dinkins did not know whether a Negro had ever served on the grand jury or not. Dinkins added, "I don't know anything about it."

On redirect examination, Dinkins was furnished a jury list for the February 23, 1959, term of criminal court which contained some sixty-eight names. No question pertinent to the issue raised by the motion was asked Dinkins with respect to this list.

Henry Sylvester Lawson had worked as a mechanic at a cotton seed oil mill and retired. He testified he had never served on a grand jury, but that he had served on a jury in a city court some ten or fifteen years ago. However, further questioning brought out that rather than being a juror, he was in that court in the capacity of a witness.

[fol. 225] Lawson did not know any Negroes who had *served* on juries in Dallas County, and he "had just heard tell of some being called but they didn't serve."

John Brown had been summoned for Federal jury duty, but had never served on a State court jury, either petit or grand. When asked if he knew of any Negro who had served on such juries, he answered, "I can't remember. In fact, I haven't been around in court too much."

On examination by the court, it was brought out that Brown did not know whether Negroes had served on juries or not. The Federal venire on which Brown had been called consisted of thirty men, of whom two were Negroes. Brown did not serve on any panel.

The defendant then called the chairman of the jury commission who had been in office since April, 1954. He testified he had participated in preparing the jury rolls in Dallas County, had interviewed prospective jurors, and with the other two members of the commission met and decided when to add names to the list. He had never counted the number on the list. He gave as his estimate that one in ten jurors on the list was a Negro. The total number on the list he guessed at being around 1800.[4] He did not know of the composition of grand juries and petit juries.

In making up the list the chairman of the commission went about to different parts of the county, and where he knew "good men" he asked them about others, and the other [fol. 226] commissioners apparently followed the same method. Then the names are entered on the list or roll and each name corresponds with a card that goes in the jury box.

The commissioners interviewed both white and Negro prospective jurors. Not all commissioners went into all precincts; nor did a commissioner, in visiting a precinct, attempt to visit every man over twenty-one years of age; rather the commissioners sought recommendations of persons known to them to be of good standing in each community.

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[4] In the *Fikes* case the ratio seemed to be 1 in 5.

It was brought out on cross-examination that the cards sent by the jury commission to go in the jury box to be drawn by the judge were all similar except for the name of each juror.

L. R. Harrison, a minister, pastor of Mt. Averett Baptist Church and of the True Vine Baptist Church, who had finished his schooling some three years before, testified that he knew of none of the members of his congregation in Dallas County who had served as jurors; nor had he ever served as a juror, nor been excused from jury service. He had not been convicted of a felony or crime involving moral turpitude, and did not drink or gamble. Furthermore, his father, who was also a minister, had never served as a juror in Dallas County.

James Black, who made his living by logging and owned timber land, testified he was forty-nine years of age; had never been convicted of a felony in Dallas County; had never served a term for more than a year in jail; had never been convicted of anything and given "that term" and given probation; was not an habitual drunkard; did not gamble; had not been arrested for gambling or loitering; could read and write English fairly good; had never served as a juror; had never been called to serve as a juror; did not know of [fol. 227] any of his friends who had ever served on a grand or petit jury; nor had he personally been asked to be excused from so serving.

Black had no ailment or crippling disease that might have prevented him from so serving. He was a Mason. He did not know of any members of his lodge who had served as jurors, including the then Master.

On cross-examination Black testified he had never made an effort to find out anything about whether Negroes served on juries or not. He had never checked the list of jurors in Selma newspapers to see if any Negroes were on it. He did not know Roosevelt Dawson. He did know Tom Waller, who ran a dry cleaning plant, but he did not know that Waller had been subpoenaed for jury duty that week. He knew Percy Huckabee, but he did not know that Huckabee had been subpoenaed for jury duty that week. He did not know Young Childers, a farmer, nor did he know Bennie Phillips, who had apparently also been called.

A stipulation was made that the 1950 Federal census showed 6940 white males and 7956 colored males over the age of twenty-one years in Dallas County.

The State then put Terrell Hicks, assistant cashier of a Selma bank, who had served on a grand jury in January, 1954, on the stand. He recalled a Negro by the name of Roosevelt Dawson had served on that grand jury. On cross-examination he stated that he had no personal knowledge of any Negroes serving on a grand or petit jury thereafter. On redirect it was brought out that he had made no attempt to find out about grand juries other than the one on which he served.

[fol. 228] The State then produced the sheriff who had held that office since November 8, 1955. We excerpt from his testimony:

"Q. Since November 8, 1955, have you ever served subpoenas when there was not negroes on the jury?

"A. Not to my knowledge.

. . . . . .

"Q. Since November 8, 1955, when you became Sheriff, state the approximate percentage in your best knowledge have been negroes, negro prisoners and white prisoners?

"Attorney Gray: We object, unless he shows the age.

"Q. Over twenty-one years old?

"A. I will say it has been above eighty-five per cent negro.

"Q. And that includes all crimes?

"A. All crimes.

"Q. That leaves approximately fifteen per cent that are white. Are most of them Dallas Countians?

"A. No. I would say a large percentage of them is from Chilton County and some from Craig Air Force Base."

On cross-examination:

"Q. When you testified a moment ago as to the percentage of arrests you have made since you became

Sheriff, you meant eighty-five per cent of the total number of arrests you have made have been negroes?

"A. That is an estimate. They have been.

"Q. Would you say a large number of negroes you arrest are repeaters?

"A. To some extent, yes.

"Q. What percentage would you say?

"A. Well, it would be hard to say. I never tried to arrive at it.

"Q. Using the same judgment you used in arriving at the percentage of negroes, would you give your best judgment of the number who are repeats?

[fol. 229] "A. I would say about the same percentage, number of negroes are repeats as the whites are repeats.

• • • • • • •

"Q. So you are not saying eighty-five per cent of the total negro population are criminals? Are you not saying they are?

"A. No; I am not."

Glenn H. Defke, Chairman of the Jury Commission, was recalled and testified:

"Q. Do you know of your own knowledge how many people at Martin's Station precinct, where you lived so long, are on the jury roll?

"A. I do know, yes, sir.

"Q. Is that the only one you absolutely know?

"A. Yes. That is the only one I am positive on.

"Q. How many people in that precinct are on the jury roll?

"A. Seven.

"Q. How many negroes?

"A. Four.

"Q. The other three are whites?

"A. That is right.

• • • • • • •

"Q. Captain, what is the policy of your Commission as to white preachers and white teachers, negro preachers and negro teachers?

"A. To leave them out of the jury box. If there has ever been one put in, it was an oversight.

"Q. On the list we have now was one man W. David Holloway, Plantersville, and it shows 'Preacher & Teacher', did you know of your own knowledge when he was put on the list whether he was a preacher and teacher?

"A. No, sir, I did not.

"Q. And is it your policy to leave them both out?

"A. Yes.

"Q. Of both races?

[fol. 230] "A. Yes."

On cross-examination:

"Q. Have you talked to negroes in Selma about prospective jurors?

"A. I have."

Lt. P. L. Pyron, City of Selma Police Department, deposed:

"Q. What is the percentage of the arrests that are colored and what are white?

"A. Well,—

• • • • • • •

"Q. Answer the question.

"A. I would say seventy-five to eighty per cent are negroes."

On cross-examination:

"Q. Are most of the persons you referred to in the seventy-five per cent persons who committed misdemeanors or felonies?

"A. That includes all arrests, felonies, misdemeanors, and also traffic.

"Q. Would you say traffic violations were a larger portion of that seventy-five per cent?

"A. Well, I would say fifteen or twenty per cent probably would be traffic.

"Q. And it also includes other petty crimes, classified as misdemeanors, does it not?

"A. That includes all the arrests."

The clause of the Fourteenth Amendment, § 1, which we consider here, reads:

"• • • No state shall • • • deny to any person within its jurisdiction the equal protection of the laws."

The first and most obvious observation on this prohibition is that the denial must be by an action of the State and [fol. 231] that this State action does not embrace denials which work discriminations which are purely private in nature.[5]

With this in mind, we review some of the decisions of the Supreme Court of the United States to find what actions by the States in particular cases were considered to have operated to exclude persons from jury service because of their race or color.

In *Strauder* v. *West Virginia* (1879), 100 U. S. 303, 25 L. Ed. 664, judgment was reversed because the West Virginia jury statute provided "all white male persons who are twenty-one years • • • shall be liable to serve as jurors."

In *Neal* v. *Delaware* (1880), 103 U. S. 370, 26 L. Ed. 567, the petitioner in error claimed that the Levy Court which acted as a jury commission purposefully excluded all Negroes from its consideration. This allegation was stipulated to have the effect of evidence. Cf. *Hale* v. *Kentucky*, infra.

Gibson v. *Mississippi* (1896), 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904, was an affirmance of the Supreme Court of Mississippi. It was held that no discrimination was shown to justify removal to the Federal court. Cf. *Virginia* v. *Rives* (1876), 100 U. S. 313, 25 L. Ed. 667.

Carter v. *Texas* (1900), 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687, appears to be a procedural decision, in that a

[5] State Action, 1 Race Relations Law Reporter 613. "Private" acts sanctioned by a State are not before us. See comment 34. N. Y. U. L. Rev. 152, and Horowitz, Misleading Search for "State Action," 30 So. Cal. L. Rev. 208.

motion to quash the indictment was held not to be too late when addressed to the question of exclusion of Negroes [fol. 232] from the grand jury. Cf. *Michel* v. *Louisiana*, 350 U. S. 91, 100 L. Ed. 83, 76 S. Ct. 158, and *Reece* v. *Georgia*, 350 U. S. 85, 100 L. Ed. 77, 76 S. Ct. 167.

In *Rogers* v. *Alabama* (1904), 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 257 (reversing judgment under an unpublished opinion, Ala. Sup. Ct., filed July 10, 1903), there was a motion to quash the indictment because the jury commissioners excluded from the grand juror list all colored persons. This decision, too, is a procedural one, inasmuch as the State moved in the trial court to strike the motion to quash, and the motion to quash was stricken from the files.

The Supreme Court of the United States, in effect, said that the motion to quash, though prolix, sufficed to raise the Federal question. It would appear from this case and from the *Neal* opinion that a mere allegation in conclusionary form is sufficient and the quo modo of the exclusion need not be pinpointed by a defendant.

In *Martin* v. *Texas* (1906), 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497, the motion to quash the indictment because of exclusion of Negroes from the grand jury was overruled in the trial court. The State had taken issue, but Martin adduced no evidence in support of his motion. The court, per Mr. Justice Harlan, said:

> "• • • The trial court, it must be assumed from the record, had nothing before it, when deciding the motions to quash, except the written motions and the written answers thereto. • • • (p. 319)
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> • • • • • • •
>
> "• • • The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the Fourteenth Amendment were violated." (p. 321.)

[fol. 233] Later cases cite *Martin* for the proposition that the defendant bears the burden of proof.

Norris v. *Alabama* (1935), 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579 (rev'g 229 Ala. 226, 156 So. 556). On the motion to quash the indictment returned by the grand jury

to the Jackson County Circuit Court, Norris adduced evidence which tended to show that no Negroes had been called for jury service in that county in a long number of years. The books containing the jury roll were produced in court and there was a dispute touching entries therein as to the genuineness of the listing of names of six Negroes. This misprision, the Alabama Supreme Court implied, was the responsibility of the clerk of the board of jury supervisors. The Supreme Court of the United States considered Norris made out a prima facie case that there were qualified Negroes in the county, and that the State had failed to overcome this showing of an exclusion.

Hale v. *Kentucky* (1938), 303 U. S. 613, 82 L. Ed. 1050, 58 S. Ct. 753 (rev'g 296 Ky. 743, 108 S. W. 2d 716). Hale's motion offered to prove that there were 8,000 Negroes in a population of 48,000, with 700 Negroes on the tax assessor's books as compared to 6,000 white persons. The jury wheel had 500 to 600 names, all of white citizens. Upon the Attorney General's stipulating that the motion could be taken as evidence, it was held that the Commonwealth had failed to overcome the prima facie showing of exclusion arising from the absence of the names of Negroes in the jury wheel.

Pierre v. *Louisiana* (1939), 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536 (rev'g 189 La. 764, 180 So. 630). Pierre moved to quash the indictment and the general venire from which [fol. 234] both grand and petit juries came. The parish population included at least one-third Negroes. The trial judge sustained the motion to quash the petit jury panel and venire, but denied as to the grand jury, taking the view that the indictment was not evidence of guilt.[*] Under the applicable Louisiana procedure, the jury commissioners pick the names of twenty qualified citizens. From these twenty the judge selects a grand jury foreman and the sheriff draws eleven more. From 1896 to 1936 no Negroes were ever selected by the commissioners.

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[*] Cf. Rives, J., in *United States, ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, citing Jackson, J., dissenting in *Cassell* v. *Texas*, infra.

The petit jury venire for December, 1936, contained the names of three Negroes out of some 300. One of these Negroes was dead, one was misnamed, and one was called for service in 1937. The population of St. John the Baptist Parish was twenty-five to fifty per cent Negro. The court, per Black, J., held that the quashal of the petit jury venire and panel imported evidence sufficient to quash the indictment, and also that the operation of the system of selection made a prima facie showing (unrebutted) that Negroes were systematically excluded from grand juries.

Smith v. *Texas* (1940), 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164 (rev'g 136 S. W. 2d 842). Three thousand Negroes met the statutory qualifications for grand jurors. Between 1931 and 1938 only 5 of 384 grand jurors were Negroes. This disparity came from the commissioners putting Negroes last on the list of sixteen names where it was a uniform custom for the court to pick the first twelve names as the grand jury.

The court, per Black, J., remarked:

> [fol. 235] "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list."

Hill v. *Texas* (1942), 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159 (rev'g 157 S. W. 2d 369). Like *Neal* and *Martin* this is a case hinging on the quantum of proof. After showing there were over 55,000 Negroes in Dallas County, Hill was considered by the Supreme Court to have made a prima facie case of exclusion even after allowing for ineligibility.

No Negro had ever been summoned in some twenty or more years. The jury commissioners claimed lack of personal acquaintance.

The court, per Stone, C. J., rejoined (p. 404):

> "* * * The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. * * * Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service. * * *"

[fol. 236] *Akins* v. *Texas* (1945), 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276 (aff'g 182 S. W. 2d 723). Akins sought to quash the indictment because of an "alleged purposeful limitation on racial representation." Under the Texas practice shown, the trial judge appoints grand jury commissioners who select a list of sixteen persons from which twelve are chosen by the judge.

In this case the commissioners interviewed and chose only one Negro. This Negro the judge empaneled.

This case must be read with *Cassell* v. *Texas*, infra. In *Akins* there was a change shown from former complete exclusion. However, this change had not been practiced long enough for a statistical pattern negativing chance to have emerged.

Patton v. *Mississippi* (1947), 332 U. S. 463, 92 L. Ed. 76, 68 S. Ct. 184 (rev'g 201 Miss. 410, 29 So. 2d 96). There

was evidence that for thirty years no Negroes had appeared on a jury. It appears that the Mississippi statute, unlike the Alabama statute, requires that a juror also be an elector. Negroes were shown to be registered poll tax paying voters. No evidence explained their absence from the venires. Cf. *United States* v. *Harpole*, supra, n. 6.

Cassell v. *Texas* (1950), 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629 (rev'g 216 S. W. 2d 813). Testimony showed that the jury commissioners of Dallas County, Texas, had taken the affirmance of *Akins* v. *Texas*, supra, to mean that the inclusion of one Negro, no more and no less, did not mark indictment of a Negro by a grand jury so composed as denying equal protection. The majority opinion considered the commissioners were under a duty to familiarize themselves with the eligible jurors. In view of the size of the population of Dallas County, it was assumed that a large [fol. 237] proportion of the Negroes were eligible. The majority said proportional limitation is no more permissible than is proportional representation mandatory. There must be "neither inclusion nor exclusion because of race."

In *Avery* v. *Georgia* (1953), 345 U. S. 559, 97 L. Ed. 1244, 73 S. Ct. 891, there was a drawing from a jury box containing white and yellow tickets. The white tickets were for members of the white race and the yellow for Negroes. This system was held to be prima facie evidence of discrimination, and it mattered not that the judge who drew the tickets in no way chose between white and yellow.

Brown v. *Allen*, *Speller* v. *Allen*, *Daniels* v. *Allen* (1953), 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397. (Habeas corpus denied to examine North Carolina sentences after exhaustion of State procedure.)

In the *Brown* case confinement of the selection of jurors for grand and petit juries to taxpayers in Forsyth County was held not to be discriminatory per se.

In the *Speller* case the fact that there were dots on scrolls bearing the names of Negroes was held to be immaterial. "The jury box was produced in court, opened, and counsel for defendant permitted to examine the scrolls." The selection of the venire was made by a child's drawing the names from the box. The court, in referring to the undisputed prior exclusion, stated (at p. 479):

"• • • Former errors cannot invalidate future trials. • • •"

Hernandez v. *Texas* (1954), 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667 (rev'g 251 S. W. 2d 531). A motion to quash the indictment and the jury panel because of the systematic [fol. 238] exclusion of persons of Mexican descent from (a) jury commissioners, (b) grand jurors, and (c) petit jurors. The court, per Warren, C. J., referred to the pattern of proof in *Norris* v. *Alabama*, supra, and described this as the "rule of exclusion," which the State had not explained as due to circumstance or chance.

Reece v. *Georgia* (1955), 350 U. S. 85, 100 L. Ed. 77, 76 S. Ct. 167 (rev'g 211 Ga. 339, 85 S. E. 2d 773), is a preliminary procedure case companion to *Michel* v. *Louisiana*, supra, and turns more on the due process clause for decision, although the question raised in the court below, which was overruled for procedural reasons, was one coming under a charge of systematic exclusion of Negroes from the grand jury. The ratio decidendi of this case affords no precedent here.

In *Eubanks* v. *Louisiana* (1958), 356 U. S. 584, 2 L. Ed. 2d 991, 78 S. Ct. 970 (rev'g 232 La. 289, 94 So. 2d 262), there was a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury in Orleans Parish. The system of selection resembled that in *Pierre* v. *Louisiana*, supra, in that a jury commission selects the names of not less than 750 persons competent to serve as jurors. From this list the commission semi-annually draws the names of seventy-five persons. A judge of the criminal court picks a twelve-man grand jury from these seventy-five. The court said (p. 586):

"• • • Obviously the judges have broad discretion in selecting from the list • • • Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge who chose the jury that tried petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community. Petitioner does not challenge

[fol. 239] this system of choosing grand jurors, as such, but he does contend that it has been administered by the local judges so that * * * (Negroes) have been systematically excluded * * *"

The court continued (p. 587):

"* * * We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the list submitted to the various local judges. * * *"

An analysis of the statutory method of picking jurors shows that the Alabama statutory scheme compares most nearly to that shown in the North Carolina case of *Speller* v. *Allen*, supra.

We have here no question of statutory exclusion, directly or indirectly. We do not require jurors, even those who cannot read or write English, to be property owners. We do not require jurors to be registered voters.

However, our statutes and decisions are replete with qualitative standards to bar those convicted of various felonies, misdemeanors and municipal offenses. The jury statutes probably also confer far too many occupational exemptions.[1]

The only opportunities, under the Alabama statute, for a system of exclusion to operate would be either in (a) fraudulent drawings from the jury box for the venire or or from the hat (or box) in picking a grand jury panel, or (b) a deliberate wilfull passing over all qualified Negroes in making up the original list.

It is noteworthy in this case that Anderson did not, as did Norris in *Norris* v. *Alabama*, supra, make any attempt to [fol. 240] produce the jury rolls in open court so that they might be examined for the presence or absence of Negroes.

Indeed, the State's evidence undisputedly showed that there were Negroes on the jury rolls. There was uncon-

[1] Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274.

troverted testimony that each venire contained an average maximum of seven to eight Negroes.

In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries (*Draper* v. *State*, 250 Ala. 679, 36 So. 2d 73), and the same rule obtains in the selection of grand juries.

That in the last five years Negroes have, in many instances, asked to be excused from jury service in Dallas County, is not a showing of any action on the part of the State of Alabama or any of its officials to exclude them from juries.

The record does not show how the State and the defendant chose to exercise the strikes as to the array for the petit jury. See Code 1940, T. 30, § 60, as to striking jurors in noncapital criminal cases; § 64, capital cases. If this were to have been made a point upon appeal, the record could and should have been required so to show. *Vernon* v. *State*, 245 Ala. 633, 636, 18 So. 2d 388.

Unlike Texas or Louisiana, the members of a grand jury are not selected vis-a-vis any official of the State other than upon their first going upon the roll. Our trial judge, after hearing requests for excuses, has the names of all the veniremen placed in a hat or box and then proceeds to draw names.

No allegation is made in this case that there was any form of selection other than by lot. There was nothing such as white and yellow cards or "marked decks," so that no [fol. 241] question arises as to the drawing of the venire or of the grand jurors from the hat or box. This results then in leaving open as the only point of enquiry whether or not the jury commissioners have any system or scheme for excluding Negroes from the rolls.

We consider the trial judge did not abuse the discretion confided in him and came to a reasonable conclusion based on substantial evidence. Among our reasons for so believing are:

1. The trial judge was entitled to take judicial knowledge of the size of the jury roll, which was testified to comprise some 1800 names, from his acquaintance therewith in dra-

ing from the jury wheel or box for the various venires. This knowledge also was available to him from the published opinion of our Supreme Court in the *Fikes* case in which it was pointed out that of some 1500 names on the jury list at that time 250 to 300 were of Negroes.

2. The trial judge was entitled to take judicial knowledge of the existence of the names of Negroes on the jury roll from the fact that Negroes appeared on the venires attending the court in substantial numbers.

3. That the ratio of white jurors to Negro jurors should be greater than in proportion to the ratio of white men to Negro men because of, among other pertinent factors, the undisputed evidence of a greater number of arrests of Negroes by the law enforcement officers of Dallas County and the city of Selma. Even with an allowance for repeaters, substantially more (and out of population proportion) of the persons arrested were Negroes.

4. The trial judge was entitled to consider from his own knowledge as presiding judge over trials of felonies and [fol. 242] misdemeanors as to the proportion of persons convicted as between white and Negro defendants, a matter on which no evidence was offered by either side.

5. The trial judge was entitled to take into consideration the failure of Anderson to establish any coercion or inducement on the part of any state, county, or local official or of any conduct condoned by them which would cause Negroes to seek to excuse themselves from jury duty in Dallas County, Alabama.

6. The trial judge was entitled to take into consideration the failure of Anderson to ask for the production of the jury rolls themselves for examination in open court. The Alabama law generally prefers as evidence where possible that which admits of less argument and dispute, and the jury rolls themselves would have afforded a much more authoritative solution than is given by hearsay and repute.[8]

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[8] *Shepherd* v. *Sartain*, 185 Ala. 439, 64 So. 57; Code 1940, T. 30, § 20, as amended, last sentence; *State* v. *Miller*, 204 Ala. 234, 85 So. 700; *Norris* v. *Alabama*, supra.

We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama.

Accordingly, the judgment below is due to be

Affirmed.

[fol. 243]

November 24, 1959

IN THE COURT OF APPEALS OF ALABAMA

LOUIS LLOYD ANDERSON, Appellant

vs.

THE STATE OF ALABAMA, Appellee

APPLICATION FOR REHEARING—Filed November 24, 1959

To the Honorable Judge of Said Court:

Now comes the Appellant Louis Lloyd Anderson, by and through his Attorneys of Record, and moves this Honorable Court to grant him a Re-hearing in the above entitled cause, and to revise, reverse and hold for naught the Judgment of this Court rendered on the 10th day of November, 1959, affirming the Judgment of the Circuit Court of Dallas County, Alabama and that this Court will withdraw the execution of its Certificate of Judgment, pending a ruling on the Motion for Re-hearing.

Submitted herewith is Brief and Argument in support of said Motion.

Fred D. Gray, Peter A. Hall, Orzell Billingsley, Jr.,
Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 244]

THE ALABAMA COURT OF APPEALS

LEWIS LLOYD ANDERSON

v.

THE STATE OF ALABAMA

Appeal from Dallas Circuit Court

ORDER DENYING APPLICATION FOR REHEARING—
December 1, 1959

It is ordered that the application for rehearing, filed by the appellant in this cause on November 24, 1959, after being duly examined and considered by the court, be and the same is hereby overruled.

[fol. 245]

THE SUPREME COURT OF ALABAMA

2 Div. No. 411
[C/A No. 2 Div. 16]

EX PARTE LOUIS LLOYD ANDERSON

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS—
Filed December 14, 1959

IN RE: LOUIS LLOYD ANDERSON, Appellant,

vs.

THE STATE OF ALABAMA, Appellee.

(Circuit Court of Dallas County, Alabama)

December 14, 1959 ..... Submitted on Briefs (Court En Banc)
March 17, 1960 ..... Motion and Writ Denied; Petition Dismissed
March 31, 1960 ..... Application for Rehearing Filed
May 19, 1960 ..... Application for Rehearing Overruled

[fol. 246]

EX PARTE LOUIS LLOYD ANDERSON, Petitioner

IN RE: LOUIS LLOYD ANDERSON, Appellant,

vs.

THE STATE OF ALABAMA, Appellee.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Your petitioner, Louis Lloyd Anderson, hereby respectfully petitions this Honorable Court for a writ of certiorari, directed to the Court of Appeals of Alabama, to send up the record and proceedings in this case, and to revise, review, reverse and hold for naught that certain judgment and opinion rendered by the Court of Appeals of Alabama on the 10th day of November, 1959, wherein Louis Lloyd Anderson was appellant and the State of Alabama was the appellee, which said judgment of the Court of Appeals affirmed the judgment of the Circuit Court of Dallas County, Alabama.

Your petitioner avers that he has filed his application for rehearing in said Court of Appeals, within the time required by law, and that said application for rehearing in the Court of Appeals was overruled on the first day of December, 1959.

Your petitioner further shows unto this Honorable Court that the Court of Appeals erred in affirming the conviction of your petitioner in this:

I. The Court of Appeals erred in denying and overruling the appellant's motion to quash the indictment in this cause, where the appellant alleged in his motion to quash the indictment and presented evidence to sustain the allegations in said motion that he, the appellant, is a member of the Negro race and that members of the Negro race are, solely because of their race or color, arbitrarily, intentionally and systematically excluded in the selection of persons for Grand Jury duty, in that the great majority of those quali-

fied for service in Dallas County, Alabama are not included on the Jury Roll, or if included on said roll, their names are left out of the Jury Box, or if put in the box and drawn, they are not listed for service, and because of the aforesaid practice no Negroes or only a mere token number have served on a Grand Jury in Dallas County, Alabama since the days of reconstruction, or certainly not in modern times, and the appellant alleged and proved that the Grand Jury which returned the aforesaid indictment against him was organized according to and in keeping with the aforesaid practice, thereby depriving the appellant of due process and equal protection of the laws, guaranteed him by the Constitution and Laws of the State of Alabama, and the Constitution of the United States of America and particularly the Fourteenth Amendment to the Constitution of the United States of America.

II. The Court of Appeals erred in denying and overrul-
[fol. 247] ing the appellant's motion to quash the venire in this cause where the appellant alleged in his motion to quash the venire and presented evidence to sustain the allegation in said motion that he, the appellant, is a member of the Negro race and that members of the Negro race are, solely because of their race and color, arbitrarily, intentionally and systematically excluded from jury service or discriminated against in the selection of persons for jury duty in that the great majority of those qualified to serve in Dallas County, Alabama are not included on the Jury Roll or their names are left out of the Jury Box, or if drawn, are not listed for service so that only merely a token number can ever serve; and that appellant avers that the Venire drawn on to-wit: the twenty-third day of February, 1959, from which the jury was selected which tried and convicted the appellant, was selected in keeping with this practice and that the Court's failure to grant the Appellant's motion to quash the aforesaid venire, deprived him of his right as guaranteed by the Constitution and laws of the State of Alabama, and the Constitution of the United States of America and particularly the Fourteenth Amendment to the Constitution of the United States of America.

III. The Court of Appeals erred in denying and overruling the Appellant's motion to declare void the composition of the jury sworn to try the appellant in this cause where the appellant alleged in his motion and presented evidence to sustain the allegation in said motion that he, the appellant, is a member of the Negro race and that no Negroes served on the jury organized to try the appellant in this cause and that members of the Negro race were excluded solely because of their race or color and that the Court's failure to grant his said motion, denied him and deprived him of his right to due process of law and the equal protection of the laws guaranteed to him by the Constitution and the laws of the State of Alabama and the Constitution of the United States of America and particularly the Fourteenth Amendment to the United States Constitution.

IV. The Court of Appeals erred in denying and overruling the appellant's motion referred to in Item I, Item II and Item III above in this petition for certiorari in that, while the Court of Appeals was examining the Constitutional question raised by said motion, the opinion of the Court referred to matters found as fact in *Fikes* vs. *State*, 263 Ala. 86, 81 Southern 2nd 303, decided by this Honorable Court on to-wit: June 23, 1955, and accepted such as an "established foundation" upon which to rely in deciding the constitutional question presented in this case; and that the matters accepted as fact, referred to, were not established in the trial below, are not a part of the record, and could not properly be accepted as facts for the purpose of deciding any question in this cause; and that to accept said facts referred to as the facts in this cause, denied to the appellant a right to a fair and impartial trial and denied to him the equal protection and due process of laws as guar- [fol. 248] anteed by the Constitution of the State of Alabama and the Constitution of the United States of America and particularly the Fourteenth Amendment to the Constitution of the United States.

V. The Court erred in overruling the appellant's motion to exclude the State's evidence on the conclusion of the State's case on the grounds that the State had not made out a prima facie case where the evidence clearly demonstrated

that the appellant was driving his automobile at a moderate rate of speed at the time the collision occurred and that there was no evidence upon which to sustain a verdict of manslaughter in the first degree.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals, requiring said Court to certify and send this Honorable Court a full and complete transcript of the record of all the proceedings of the Court of Appeals in said cause, and that This Honorable Court will, after an examination of all the proceedings heretofore had in this cause, correct the errors complained of and reverse the judgment of the Court of Appeals.

Your petitioner further prays that this Honorable Court will stay or suspend the execution of the judgment of the Court of Appeals, or request that the Court of Appeals withdraw its certificate of affirmance in this cause pending a ruling of this Honorable Court on the petition for writ of certiorari.

Submitted herewith is your petitioner's brief and argument in support of this petition.

Respectfully submitted,

Fred D. Gray, Attorney for Petitioner.

Fred D. Gray, 34 North Perry Street, Montgomery, Alabama.

Orzell Billingsley, Jr., Peter A. Hall, 1630 Fourth Avenue, North, Birmingham, Alabama.

Duly sworn to by Fred D. Gray, jurat omitted in printing.

[fol. 254]

THE SUPREME COURT OF ALABAMA

2 Div. 411

EX PARTE LOUIS LLOYD ANDERSON

(IN RE: LOUIS LLOYD ANDERSON

v.

THE STATE OF ALABAMA)

OPINION ON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS—March 17, 1960

GOODWYN, Justice.

The appellant in the Court of Appeals has petitioned us for a writ of certiorari to review the opinion and decision of that court in the case of *Louis Lloyd Anderson* v. *The State of Alabama*, 2 Div. 16.

[fol. 255] Petitioner avers in his petition "that he has filed his application for rehearing in said Court of Appeals, within the time required by law, and that said application for rehearing in the Court of Appeals was overruled on the first day of December, 1959." The State has filed a motion to strike the petition on the ground that it fails to comply with Rule 39 of the Revised Rules of the Supreme Court, "in that there does not appear on the face of the application for certiorari that application has been made to the Court of Appeals for a rehearing *of the point or decision complained of*, but merely shows that an application for a rehearing was made in the Court of Appeals."

Rule 39 provides that an application for the writ of certiorari to the Court of Appeals "will not be entertained or considered, unless it appears upon the face of the application therefor that application has been made to said Court of Appeals for a rehearing *of the point or decision complained of*. • • •." [Emphasis supplied.]

The provisions of Revised Rule 39 (formerly Rule 44) have been in effect for many years. From the wording of

the rule it is not clear what was intended by requiring that the application for certiorari show on its face that a rehearing has been sought in the Court of Appeals "of the point or decision complained of." There is some basis for construing it as requiring a reconsideration by the Court of [fol. 256] Appeals of the specific points presented for review on certiorari as a prerequisite to a review of such points by the Supreme Court. However, it has not been so construed by this court. We have consistently considered petitions for certiorari when it is shown that there has been an application for a rehearing of the case in the Court of Appeals and a denial of rehearing by that court. While, in reviewing an opinion and decision of the Court of Appeals, we have limited our review to the points included in the petition for certiorari and insisted on in brief, we have not required, as a requisite to jurisdiction, a showing that the specific points included in the petition for certiorari must first have been presented on rehearing in the Court of Appeals.

The motion to strike is denied. All the Justices concur.

On consideration of the petition for certiorari, our conclusion is that the writ is due to be denied.

Writ denied.

Simpson, Stakely and Merrill, JJ., Concur.

[fol. 257]

THE SUPREME COURT OF ALABAMA

EX PARTE: LOUIS LLOYD ANDERSON, Petitioner,

Petition for Writ of Certiorari to Court of Appeals

(In re: Louis Lloyd Anderson v. The State of Alabama)

Dallas Circuit Court

ORDER DENYING MOTION TO STRIKE PETITION FOR WRIT OF CERTIORARI AND DENYING PETITION FOR WRIT OF CERTIORARI—March 17, 1960

Comes the Petitioner, Louis Lloyd Anderson, by Attorneys, and the Petition for Writ of Certiorari to the Court of Appeals, motion of the State to strike the petition and briefs in support thereof, and answer of the Petitioner to the motion of the State, being submitted on briefs and duly examined and understood by the Court,

It Is Considered and Ordered that the motion of the State to strike the petition be and is hereby denied.

It Is Further Considered and Ordered that the Writ of Certiorari to the Court of Appeals be and is hereby denied, and that the Petition be and is hereby dismissed at the cost of the Petitioner, for which costs let execution issue accordingly.

[fol. 258]

IN THE SUPREME COURT OF ALABAMA

EX PARTE: LOUIS LLOYD ANDERSON

IN RE: LOUIS LLOYD ANDERSON, Appellant

vs.

STATE OF ALABAMA, Appellee

APPLICATION FOR REHEARING

Now comes the Appellant in the above styled cause, and respectfully moves the Court for a rehearing of this cause, and prays that upon such rehearing that that portion of the Order and Judgment of this Court made and entered on the 17th day of March, 1960, wherein this Honorable Court denied Appellant's Petition for Writ of Certiorari to the Court of Appeals of Alabama, be set aside and held for naught, and that in lieu thereof a Judgment and Decree of this Court be made granting Ap ellant's Petition for Writ of Certiorari.

Peter A. Hall, Fred D. Gray, Orzell Billingsley, Jr.,
Attorneys for Appellant.

[fol. 259]

THE SUPREME COURT OF ALABAMA

EX PARTE LOUIS LLOYD ANDERSON, Petitioner,

Petition for Writ of Certiorari to Court of Appeals

(In re: Louis Lloyd Anderson v. The State of Alabama)

Dallas Circuit Court

ORDER DENYING APPLICATION FOR REHEARING—May 19, 1960

It Is Ordered, that the application for rehearing filed by the Petitioner in the above cause on March 31, 1960, after being duly examined and considered by the Court, be and is hereby overruled.

[fol. 260]

SUPREME COURT OF THE UNITED STATES

No. 326—October Term, 1960

LEWIS LLOYD ANDERSON, Petitioner,

vs.

ALABAMA

ORDER ALLOWING CERTIORARI—November 7, 1960

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1960

No. ———

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 2

How the Federal Questions Were Raised and Disposed of 7

Reasons for Granting the Writ 8

CONCLUSION 15

APPENDIX—

Opinion of the Alabama Court of Appeals 1a

Judgment of the Circuit Court 33a

Opinion of the Alabama Supreme Court 35a

CITATIONS:

Cases:

Avery v. Georgia, 345 U.S. 559 14

Cassell v. Texas, 339 U.S. 282 ..... 12, 14

Fikes v. State, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U.S. 191 ..... 6, 9, 11

Hernandez v. Texas, 347 U.S. 475 14

Hill v. Texas, 316 U.S. 400 ..... 10, 11

PAGE

Neal v. Delaware, 103 U.S. 370 ..... 10, 14
Pierre v. Louisiana, 306 U.S. 354 10
Reece v. Georgia, 350 U.S. 85 ..... 9, 10, 14
Shepherd v. Florida, 341 U.S. 50 12
Smith v. Texas, 311 U.S. 128 ..... 13, 14
Strauder v. West Virginia, 100 U.S. 303 ..... 13, 14

Statutes:

Tit. 30 Ala. Code of 1940, §3 as amended 4
Tit. 30 Ala. Code of 1940, §18 as amended 10
Tit. 30 Ala. Code of 1940, §20 as amended 11
Tit. 30 Ala. Code of 1940, §21 as amended 11

Miscellaneous:

Ala. Rep. Atty. Gen., 1936-38, p. 355 11

IN THE

Supreme Court of the United States

October Term, 1960

No. ———

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals.

Citations to Opinions Below

The opinion of the Alabama Court of Appeals is reported in 120 So. 2d 397, and is set forth in the Appendix hereto, *infra*, p. 1a. The opinion of the Supreme Court of Alabama is reported in 120 So. 2d 414, and is set forth in the Appendix hereto, *infra*, p. 35a.

Jurisdiction

The judgment of the Alabama Court of Appeals was entered on November 10, 1959. R. 210-242; Appendix p. 1a *infra*. A petition to the Supreme Court of Alabama for writ of Certiorari was denied on March 17, 1960, R. 257, and application to the Supreme Court of Alabama for rehearing was overruled on May 19, 1960, R. 259. The jurisdiction of this Court is invoked pursuant to 28 United

States Code, Section 1257(3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States.

Question Presented

Whether the practice of the Dallas County, Alabama, Jury Commission in selecting Negroes for the Jury Roll results in the arbitrary and systematic exclusion of Negroes on racial grounds from both grand and petit juries in this case, contrary to the equal protection clause of the Fourteenth Amendment.

Constitutional Provision Involved

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

The judgment of the Alabama Court of Appeals, Second Division, entered in this case on November 10, 1959, affirmed a judgment and sentence of the Circuit Court of the Fourth Judicial Circuit in and for Dallas County, Alabama, adjudging the petitioner guilty of first degree manslaughter, and sentencing the petitioner to ten years' imprisonment.

Execution and enforcement of the judgment of the Alabama Court of Appeals was stayed on May 27, 1960, by Presiding Judge of the Alabama Court of Appeals Robert G. Harwood, "for 90 days from the 19th day of May 1960, to enable appellant (petitioner) herein, to apply for and obtain, if he can, a review of said cause by the Supreme Court of the United States, . . ."

The circumstances leading up to this judgment are as follows:

The petitioner, a Negro minister, owned a 1956 Black Lincoln Premier (R. 96, 113, 121, 155). On January 20, 1959, while driving along a street in Selma, Alabama, he struck and killed one Tom Reese. As a result, he was indicted by a Dallas County grand jury for Murder in the 2nd degree, which true bill included the lesser charges of voluntary and involuntary manslaughter. The petitioner entered a plea of not guilty (R. 3).

No Negro has ever served on a petit jury in Dallas County, and only one Negro reportedly ever served on a Dallas County grand jury. For this reason, petitioner, prior to trial on the merits, filed a motion to quash the indictment on the ground that Negroes were systematically excluded from grand jury service in Dallas County solely because of their race and color. The motion included allegations that no Negro had served on the grand jury which had indicted him although Negro males qualified under the state law to serve outnumbered qualified whites. Petitioner declared that the methods followed by the Jury Commission of Dallas County in selecting the names of Negroes to be placed on the jury roll was highly irregular, arbitrary and contrary to the method prescribed by the laws of the State of Alabama and the Constitution of the United States (R. 3-5). Petitioner also filed a motion to quash the venire (R. 7), and later filed a motion to declare void the composition of the jury sworn to try the defendant, both on the constitutional allegations of systematic exclusion of Negroes from jury service (R. 9).

To prove racial discrimination, the petitioner introduced the 1950 Federal Census reporting 6,940 male whites over twenty-one years of age in Dallas County, Alabama, and 7,956 male Negroes over twenty-one years of age in Dallas County (R. 55). The Solicitor for the Fourth Judicial Cir-

cuit which includes Dallas County, admitted that since h took office in 1954, no Negroes have served on the grand juries which are organized twice a year (R. 28-29). The Solicitor also testified that each venire contains about 7(names, that an average of six or seven of these are Negroes and that while some of these ask to be excused, names of the others are placed in the hat from which the grand jury is drawn (R. 29-30). He reported (R. 30-31) that to his knowledge there were five Negroes on the venire drawn for the trial of this case, two were excused for illness, one claimed an over age exemption, and two remained on the venire. No Negro served on the grand jury in this case.

Two other court officials admitted that they could not recall any Negroes having served on a grand jury, while a third, a Deputy Circuit Solicitor, could recall only one Negro whom he believed had served on a grand jury in 1954 (R. 33). The Circuit Clerk, who served from 1950 to 1953 as secretary to the jury Commission, could not recall any Negroes ever serving on grand juries. She maintained, however, that there was no racial identification on the jury cards (R. 31-32).

Five Negroes who were long-time residents of Dallas County and eligible for jury service, reported that they had never served on any jury and knew of no Negroes who had performed jury service (R. 35-37, 41-44, 48-52). One man held an M.A. degree, Phi Beta Kappa membership, and had lived in Dallas County for 65 years. On cross-examination, the State pointed out that this witness until the age of 60 had been a teacher and thus exempt from jury service (R. 36).[1] The Chairman of the Dallas County Jury Commission reported that the Commission followed

[1] Among the classes of persons exempt from jury service under Alabama law unless by their own consent are: "teachers while actually engaged in teaching;" Tit. 30 Ala. Code of 1940, §3 as amended.

a policy of not placing the names of exempt persons on the jury roll (R. 61), but petitioner introduced the jury list for the February 23, 1959 term of court, which list contained the name of one "W. David Holladay, Preacher and Teacher" who had been called for the present session of the court (R. 37-39). The record indicates that Mr. Holladay was white. The Jury Commissioner admitted as much, but explained that the white preacher-teacher's name had been placed on the roll "by mistake" (R. 61).

The Jury Commission chairman, who had held his post since 1954, stated that he thought that there were 1800 names on the jury roll, but also admitted that only one out of twelve was a Negro (R. 46). He said that in obtaining names for the jury rolls, both Negro and white prospective jurors were interviewed, and that he relied on recommendations of citizens who were "high class folks in various parts of the County, . . ." (R. 47).

He reported that he talked to persons all over the county about prospective jurors, and that in those precincts where he didn't know the Negroes, he would "ask some good white man" who [illegible] suggest names (R. 61-62).

He also reported that of those persons he checked, the ratio between whites and colored who had been convicted of crime was "eight or ten to one in favor of the whites" (R. 60). The Sheriff of Dallas County also estimated that 85% of the arrests he made were Negroes, although he admitted that some were repeaters, and that he did not mean to indicate that 85% of the total Negro population were criminals (R. 57-59). There was no evidence concerning what proportion of the Negro population had been convicted of crime.

The State called a witness who reported serving on a grand jury in Dallas County during January 1954, at which time one Negro also served on the grand jury (R. 56).

After hearing the testimony and considering the evidence offered by petitioner and the state regarding the above motions, the trial court overruled them (R. 6, 8, 10). On appeal in the Alabama Court of Appeals this point was again urged and it was held that the petitioner failed to carry the burden of proving that there was any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excluded or limited the number of Negroes available for jury service in Dallas County, Alabama (R. 242).

The Alabama Court of Appeals in determining that petitioner failed to prove that there was any scheme which excluded or limited the number of Negroes available for jury service in Dallas County, referred to the Supreme Court of Alabama's opinion in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U. S. 191, "to call attention to the fact that the jury commission of Dallas County made up a new roll of jurors in October 1953, so that no exclusion before that date would have any relevancy here" (R. 218), and further considered that opinion for a finding as to the make up of the jury roll in October of 1953:

> ". . . The Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, . . ." (R. 219).

The Alabama Court then concluded that except for the adding of names of men newly qualified, and the deletion of those who have died or become disqualified, as required annually by statute, the basic makeup of the jury roll would not be changed. (R. 219).

How the Federal Questions Were Raised and Disposed of

The federal question concerning the right to be indicted by a grand jury and tried by a petit jury from which members of the petitioner's race have not been arbitrarily and systematically excluded because of their race or color was properly raised before the Alabama Court of Appeals and disposed of adversely to petitioner's contentions. This is demonstrated in the opinion of the Alabama Court of Appeals (R. 218-242) and is largely described by the following quotation:

> "We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama."

The issue of racial discrimination in jury selection as prohibited by the equal protection clause was first raised prior to the trial at which time petitioner submitted motions to quash the indictment (R. 4-5), quash the venire (R. 7), and to declare void the composition of the jury as sworn (R. 9). The trial court overruled each of these motions (R. 6, 8, 10). Following the verdict, petitioner submitted a motion for a new trial (R. 18-19). Paragraphs 8, 10, 12, 13 and 14 of this motion alleged deprival of the equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution in that petitioner was indicted and tried by juries from which members of his race were arbitrarily and systematically excluded because of their race or color as set forth therein in some detail. This motion for a new trial was overruled and exception

was made thereto (R. 19-20). A writ of certiorari by petitioner to the Supreme Court of Alabama (R. 246-249), specifically raising the jury discrimination point, was denied (R. 257), and his application for rehearing to the Supreme Court of Alabama (R. 258), was overruled (R. 259).

Reasons for Granting the Writ

Writ of certiorari to review the judgment of the Alabama Court of Appeals should issue because it has decided substantial federal constitutional questions contrary to applicable decisions of this Court.

I. The grand and petit juries which indicted and convicted petitioner of first-degree manslaughter were bodies from which members of the Negro race were arbitrarily and systematically excluded by the jury Commission of Dallas County through the use of a policy which resulted in no Negro serving on a petit jury, and only one Negro serving on a grand jury during a seven year period.

II. A matter of vital importance to the public is presented since the policy and practices under which juries are selected in Dallas County, Alabama, by their operation and their result, reveal a scheme to follow the word and evade the spirit of decisions of this Court prohibiting the systematic exclusion of Negroes from jury service because of their race or color.

I

The testimony in this case shows that petitioner has made out and supported his charge of systematic exclusion of Negroes from jury service in Dallas County. No Negro has ever sat on a petit jury and only one Negro has

served on a grand jury since 1953, when a new jury roll was prepared, allegedly without regard to race.[2]

There are almost 8,000 male Negroes over 21 years of age in Dallas County, many of whom must be presumed qualified for jury service. But no more than 150 of them are presently listed on the jury roll.[3] The venires drawn in Dallas County generally contain at least 70 names, but jury commission personnel testified that the number of Negro names drawn for each venire varies between five and eight.

Petitioner submits that it was on just such a showing in *Reece* v. *Georgia*, 350 U. S. 85, 88, that this Court concluded:

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection on the jury list of a relatively few Negroes who would probably be disqualified for actual jury service all point to a discrimination 'ingenious or ingenuous.' Smith v. Texas, 311 U. S. 128."

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[2] The opinion in *Fikes* v. *Alabama*, 81 So. 2d 303, 309, confesses that "There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race."

[3] Testimony was given by five Negro residents of Dallas County including a minister, a mechanic, teacher and a businessman, each of whom was not only qualified for jury service, but by virtue of profession and activities, would most likely have heard of Negroes who had actually served. Each said that they had never served on any County Jury, nor had they known of any Negro who had served.

There are similar statements in several other cases.[4] In each of these cases, the Court held that, on such facts, a *prima facie* case of race discrimination was established which the state had the burden of rebutting.

In the *Reece* case, *supra*, a showing of no Negro service on the grand jury list caused the Court to conclude that "petitioner's motion stated and his evidence supported a *prima facie* constitutional claim." 350 U. S. at 88. In *Hill* v. *Texas*, 316 U. S. 400, no Negro service on the grand jury in a county with a high percentage of literate Negroes resulted in a finding that "we think petitioner made out a *prima facie* case, . . ." 316 U. S. at 404. In *Pierre* v. *Louisiana*, 306 U. S. 354, 351, similar evidence by petitioner "created a strong *prima facie* showing that Negroes had been systematically excluded—because of race—from the grand jury and the venire from which it was selected."

The State totally failed to show that the long history of all white petit juries and, with one lone exception, all white grand juries in Dallas County was not the result of a policy and practice of the Jury Commission resulting in the systematic exclusion of Negroes from the jury roll.

The State statutes under which the Jury Commission functioned left little doubt as to their duty:

> "The clerk of the jury commission shall, under the direction of the jury commission obtain the names of every male citizen of the county over twenty-one . . ." Tit. 30, Section 18, Ala. Code of 1940, as amended.
>
> "The jury commission, . . . shall make in a well bound book a roll containing the name of every male citizen living in the County who possessed the qualifi-

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[4] *Hill* v. *Texas*, 316 U.S. 400, 401-403; *Pierre* v. *Louisiana*, 306, U.S. 354, 351; *Neal* v. *Delaware*, 103 U.S. 397.

cations herein prescribed . . ." Tit. 30, Sec. 20; Ala. Code of 1940 as amended.[5]

"The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment;" Tit. 30, Sec. 21, Ala. Code of 1940, as amended.

In the face of these clear statutory commands, and notwithstanding census figures showing almost 8,000 male Negroes over 21 in Dallas County, the Chairman of the Jury Commission testified that there were around eighteen hundred names on the jury roll, of which number only one in twelve are non-white.[6] That the Jury Commission Chairman did not believe that most Negroes in Dallas County were qualified is clearly inferrable both from the small number of Negroes on the Jury role, and from his testimony, particularly his admission that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. It is this form of discrimination which "can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve," *Hill* v. *Texas*, *supra* at 404.

---

[5] Section 20 has the effect of requiring that the name of every male citizen possessing qualifications described to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year. Rep. Atty. Gen., 1936-38, p. 355.

[6] Compare with the opinion in *Fikes* v. *State*, 81 So. 2d 303, reporting that "the Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes. . . ." The testimony here thus indicates that since 1953, not only have no additional names of Negroes been placed on the jury roll in Dallas County, but that from 100 to 150 names have been removed.

The State made much of the fact that on each venire drawn in Dallas County there are listed from five to eight Negroes, some of whom ask to be excused. The petitioner submits that the very uniformity of the Negro representation on the venire smacks of the form of "proportional representation" held invalid in *Cassell* v. *Texas*, 339 U. S. 282, 287; *Shepherd* v. *Florida*, 341 U. S. 50.

The State also elicited testimony from the Sheriff and other Dallas County law enforcement officers to the effect that a high percentage of the arrests made in the County were of Negroes. The Alabama Court of Appeals, without further evidence as to how many Negroes have been arrested, or how many Negroes have been excluded for this reason, interpreted the testimony as, in part, justifying the absence of Negroes on the County's juries. However, such testimony falls far short of explaining why not even one Negro has ever served on a petit jury, and why only one Negro has served on a grand jury.

The procedure employed here is quite similar to that held invalid by this Court's ruling in *Cassell* v. *Texas*, *supra*. There Mr. Justice Reed found that it was not hard to ascertain an individual's qualifications for jury service, and that it was reasonable to assume that a large portion of the Negroes of Dallas County had the statutory requirements for jury service. He held that it was the duty of the Commissioners to familiarize themselves fairly with the qualifications of the eligible jurors of the County without regard to race or color.

II

The issue posed by this case is of vital public importance and makes necessary a decision by this Court as to whether the force and effect of its earlier decisions prohibiting the exclusion of Negroes on juries may now be

circumvented by complex schemes, valid on their face, but administered in a manner resulting in either the complete exclusion of Negroes from juries, or their appearance in carefully controlled token numbers.

In a long line of decisions since *Strauder* v. *West Virginia*, 100 U. S. 303, this Court has reversed state criminal convictions because of systematic exclusion of the defendant's race from grand and petit juries. As a result, many communities have sought to amend their jury selection laws, rules and practices so as to mask their continuing practice of excluding Negroes from jury service with a heavy coat of *de facto* compliance with the constitutional standard.

In the past, this Court has found in even the most ingenious of these schemes the same fatal defect present in the case here: the insufficiently explained reason as to why in a county where at least 53 per cent of the eligible Negroes are potentially qualified for jury service, there is a steadily decreasing number of Negroes listed on the jury roll, only a token number of whom have been listed on each venire, and only one of whom has served over a period of several years.

Here, as with many other cases of jury discrimination heard by this Court, the statutory scheme is not in itself unfair, and is capable of being carried out with no racial discrimination whatsoever, but as was the situation in *Smith* v. *Texas*, 311 U. S. 128, 131, "by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."

Clearly, the Constitution entitles petitioner to more than the Jury Commissions' protestations of impartial selection

of jurors in Dallas County. *Reece* v. *Georgia*, 350 U. 85; *Hernandez* v. *Texas*, 347 U. S. 475. As was said *Smith* v. *Texas*, *supra* at 130, "The Fourteenth Amen ment requires that equal protection to all must be given- not merely promised."

Therefore, the petitioner maintains that if they are have meaning, his rights under the equal protection claus must exceed merely prohibiting jury officials from placin only the names of whites on the jury list, by statut *Strauder* v. *West Virginia*, *supra*, or by policy, *Neal Delaware*, 103 U. S. 370; or placing Negroes' names on th list in such a manner as to make them easily identifiabl *Avery* v. *Georgia*, 345 U. S. 559; or limiting to one th number of Negroes on each grand jury, *Cassell* v. *Texa supra*.

Not only the petitioner, but all Negroes and the publ in general will be affected by the Court's decision in th case. At issue is this Court's willingness to continue i suring the right of a Negro to be indicted and tried b juries from which the cloud of arbitrary exclusion is e tirely removed. This cloud is not removed by placing small percentage of the eligible Negroes on the jury lis while alleging that the great majority are criminals or otherways are incapable of performing the duties of juror. Nor, it is submitted, can this cloud be dispelled b somehow drawing a predictable handful of Negroes on ea venire, all but one of whom, by reason of chance, illne or easily obtained excuse, has failed to actually serve.

It is therefore clear that the decision of the Alaban Circuit Court of Appeals would sentence petitioner imprisonment in denial of the equal protection of the law

CONCLUSION

WHEREFORE, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Alabama Court of Appeals

LEWIS LLOYD ANDERSON

—v.—

STATE.

2 Div. 16.

Court of Appeals of Alabama.

Nov. 10, 1959.

Rehearing Denied Dec. 1, 1960.

* * * * * *

Judgment affirmed.

Certiorari denied, 120 So.2d 414.

* * * * * *

CATES, Judge.

Anderson has appealed his conviction of first degree manslaughter. The verdict also carried ten years' imprisonment.

The first principal point relates to the sufficiency of the evidence, and whether two witnesses were competent to testify as to the speed of an automobile.

A second question is grounded on the allegation that, in Dallas County, Alabama, there was, at the time of indictment (January 29, 1959) and the time of trial (February 27, 1959), a systematic exclusion of Negroes from juries with a consequent denial to Anderson, a Negro, of the equal protection of the law guaranteed him under the State Constitution and under the Fourteenth Amendment to the Constitution of the United States.

[1] Viewed from the verdict (as we must take the facts on appeal, Jones v. State, 33 Ala.App. 451, 34 So.2d 483), the case made by the prosecution was as follows:

On January 20, 1959, prosecution witnesses saw Anderson driving a car along Minter Street in Selma headed east. His speed was between sixty and seventy miles per hour.[1]

Minter was an unpaved street in a well populated residential neigborhood. The defendant testified the weather was "damp" and that Minter "is somewhat of a bad street most of the time but whenever it rains it is a somewhat of a deplorable condition for driving."

When Anderson got to the corner of Church Street, he ran into the front bumper and hood of a green Chevrolet headed north on Church, which had stopped on the south edge of the intersection. The impact spun the Chevrolet to its right 180 degrees from its first heading.

Forward momentum took Anderson's car down Minter Street. It swung first to the right (i. e., to the south side of the street), then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit Tom Reese who was walking across (or had just crossed) the street and had got at least beyond the middle of the left lane of traffic.[2] The car carried Reese along on its hood for several feet, then after he fell off, it ran over him, all the while swerving again to the right or south side of the street. Then back in the road again, it went on to the end of the block where it hit a tree, bounced four feet in the air and turned over.

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[1] One witness judged that Anderson's speed was about sixty or seventy miles per hour; another stated he was traveling pretty fast; a third, the driver of the Chevrolet, said sixty-five or seventy. The speed limit at the collision corner was fifteen miles per hour.

[2] L. B. Hunter, an eyewitness, said Reese was on the north edge of the roadway alongside the footpath. He further testified the force took Reese out of his shoes.

Reese had both arms and his left leg broken, an open wound ran around his abdomen from his right side and his intestines were outside.

Anderson was indicted for second degree murder. The true bill acted also as a charge of voluntary and involuntary manslaughter.

The defense was to the effect that Anderson had driven all along Minter Street at a moderate speed. He testified he was crossing Church Street at fifteen miles per hour when the Chevrolet driven by Mike Howard came at him. He recalled no more of the happening.

Anderson's physician testified the wreck had caused traumatic retrograde amnesia. The defense implied Anderson probably pressed on the accelerator while he was unconscious.

The State's showing Anderson's driving at high speed on a damp unpaved (and seemingly slick surfaced) street in a well populated area, hitting and running over a pedestrian in the left lane of travel, and the circumstance of the distance of some 396 feet his car went forward after an apparently violent collision, together with the force of its bounce when it hit the tree, made out a prima facie case of that appreciated disregard of the results of wanton conduct from which death ensues, which is one definition of voluntary manslaughter.

[2, 3] Intent to kill is but an alternative ingredient: the same state of mind can be imputed from conduct wanton and reckless toward human life. The likelihood of another's being imperiled by the wanton conduct, no less than actual knowledge, makes for culpability, thus supplying mens rea in voluntary manslaughter. Rainey v. State, 245 Ala. 458, 17 So.2d 687; Gills v. State, 35 Ala.App. 119, 45 So.2d 44. "Wantonness may be predicated upon conduct occurring before a discovery of the peril. * * *" Lawson, J., in Buchanan v. Vaughn, 260 Ala. 482, 71 So.2d 56, 57.

Anderson has cited a number of civil and criminal decisions for the proposition that, for a killing to be first degree manslaughter, where there is no direct evidence that the act was done wilfully, the State must show it was done with consciousness that injury would probably result from the act, and such knowledge cannot be implied from the knowledge of danger, rather there must be a "design" to do wrong, or a reckless indifference or disregard of natural consequences of the act done. We have carefully considered these cases and have noted discussions of them in decisions as late as Nixon v. State, 268 Ala. 101, 105 So.2d 349 (a murder case), and Smith v. State, Ala.App., 109 So.2d 853.

We have concluded that the Rainey case, supra, is still the law and represents a reexamination and a refinement in the law of manslaughter, and one which this court and the lower court are constrained to follow.

Moreover, we consider the Rainey case to be the natural and correct corollary of the principles theretofore developed as to what may evidence intent in voluntary manslaughter. The two following quotations, we believe, will illustrate this development:

> "It is insisted on motion for new trial that there is no evidence of an intent to kill, and, in the absence of such evidence, the defendant cannot be convicted of manslaughter in the first degree. The law governing homicide is not so narrow. If a person knowingly and consciously drives a highpowered automobile at an excessive rate of speed along the public highway, where other vehicles and pedestrians are liable to be and the driver's vision is obstructed by clouds of dust and the sun is shining in his face, and at a point where he must pass a road machine which takes up at least half the road and death results to a pedestrian walking along the highway, a jury would be justified in finding that the offense was manslaughter in the

first degree * * *"—Reynolds v. State, 24 Ala.App. 249, 134 So. 815, 817.

"Without an intent to kill there can be no murder, or manslaughter in the first degree. (Citing case.) It is not required that there be a positive of specific intent to kill to constitute manslaughter in the first degree. (Citing cases.) This for the reason that where an accused's conduct or act of violence which ordinarily in the usual course of events would result in death or great bodily harm to another, and a death does result, the accused must be deemed to intend the probable results of such act, i. e., that he intended to kill. * * *"—Smith v. State, supra [109 So.2d 855].

The statement in the Rainey case has been expressly quoted with approval in the following criminal appeals: Clayton v. State, 36 Ala.App. 175, 54 So.2d 719 (pistol killing); Harris v. State, 36 Ala.App. 620, 61 So.2d 769 (automobile manslaughter); Hanby v. State, 39 Ala.App. 392, 101 So.2d 553 (automobile manslaughter).

[4, 5] Whether or not a motorist has amnesia when striking a pedestrian is ordinarily not a matter to be determined by his testimony alone; rather it is a jury question. People v. Henry, 23 Cal.App.2d 155, 72 P.2d 915. So that, while certain defense witnesses may not have seen Anderson steering his car, the testimony of State witnesses that they did see him, coupled with the presumption of continuity arising from the undisputed fact that he was the driver at the time of the collision, made out a jury question.

[6] Had there been a both-to-blame collision, Reese's death could be laid to Anderson. The cause and effect question under the theory of the defense could still have supported the verdict had the jury chosen to believe that Anderson was driving sixty to seventy miles per hour.

Howard's contributory negligence would not absolve Anderson. Hanby v. State, 39 Ala.App. 392, 101 So.2d 553.

Therefore, we consider that, as a matter of law, the trial judge properly overruled Anderson's motion (made when the State rested) to exclude the evidence. After both sides rested, the defense took no exception to the oral charge, nor did it move for any charge affirmative as to either first or second degree manslaughter. The trial judge charged murder out, both in writing and in his oral direction.

The State produced two witnesses, Frank L. DuBose and Peter Wolff, who were standing on the corner of Minter and Mabry and saw Anderson driving "pretty fast," and that he ran into a stopped car, zigzagged across the street, and hit a tree and turned over. Neither witness noticed the car striking Reese.

Both at the trial and on appeal, a great deal has been made of the lack of testimonial qualifications of these witnesses as competent to express judgment on the speed of Anderson's car. The State brought out that the witnesses had ridden in automobiles. Although neither of them could drive, each had watched speedometers while riding and had seen traffic along city streets.[3] Excerpts from their testimony appear below.

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[3] DuBose on direct:

"Q. And how was he traveling? A. He was going pretty fast.

Q. What kind of car? Was he in a car, or what? A. He was in a car.

Q. A car. You know how to drive a car, don't you? A. No, sir.

Q. You have been riding in cars, have you not? A. Taxis.

Q. Taxis. And you have noticed the speedometer and things of that nature, didn't you? A. Yes, sir.

Q. And can you estimate from your knowledge of automobiles and riding in them, can you estimate the speed an automobile is traveling? A. Riding I can. Riding in them, I mean.

Q. When you look at an automobile and see it traveling can you from your knowledge of the speed of cars, can you

The rule of our decisions is that the speed of an accustomed object is a subject largely of common observation rather than reserved for expert opinion.

[7, 8] As stated in Vredenburgh Saw Mill Co. v. Black, 251 Ala. 302, 37 So.2d 212, 218:

> "It is well settled that the average witness does not have to have expert knowledge to testify to the speed of a vehicle in ordinary or common use. The fact that the witness McKinley had never driven a truck or automobile did not disqualify him from giving testimony as to the speed of the truck. The credibility of the testimony was for the jury."

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estimate the approximate speed that car is traveling when you see it go by? A. Yes, sir."

Wolff on direct:

"Q. Did you ever look at the speedometer to see how fast they were going? A. Yes, sir.

Q. How long have you been riding in cars? A. I couldn't really tell you.

Q. Well, all your life so far as you know? A. Yes, sir.

Q. And you have always paid attention to speedometers, have you? A. Yes, sir. • • •

Q. Did you watch him when he went by you? A. Yes, sir.

Q. Do you have an opinion as to how fast he was driving?

Attorney Hall: We object. There is no proper predicate laid. He is not qualified.

The Court: I overrule the objection. He is not asking how fast; but he wants to know if you have an opinion. Overruled.

Attorney Hall: We except.

The Court: Read the question.

(Thereupon, the Reporter read the last question propounded to the witness.)

Q. Do you have an opinion, yes or no. A. No, I don't.

Q. You did see the car? A. Sixty or seventy.

Q. Did you watch him go on down the road until this wreck took place? A. Yes.

Q. At the time the accident occurred with the green car, was he driving approximately the same rate of speed when he hit that car as when he passed by you? A. Yes, sir."

See also Williams v. Roche Undertaking Co., 255 Ala. 56, 49 So.2d 902.

[9] We consider whatever deficiencies existed in the testimony of these two witnesses were matters of weight and credibility rather than competency.

A further question arose by way of objection to the testimony of the coroner of Dallas County who was not a physician. The objection went to his expressing an opinion as to whether or not the wounds suffered by Reese probably caused his death.

[10, 11] The State brought out that the coroner had observed some seventy-five or more bodies of persons killed by being struck by automobiles. Whether or not this was sufficient qualification is largely addressed to the sound discretion of the trial judge. In view of the full discription of Reese's injuries, we need not go into whether or not the admission of the coroner's testimony over objection was an abuse of the trial judge's discretion, for the circumstances and description of Reese's being hit by Anderson's automobile and the details of his injuries constituted sufficient undisputed evidence from which the jury could have reasonably inferred that the collision caused his death. This result could have been reached without expert testimony.

In Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 972, 2 L.Ed.2d 991, Mr. Justice Black's opinion begins:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. * * *"

Appended to this statement is a footnote which contains a number of decisions theretofore rendered by the Supreme Court of the United States on the question. Three of them, in which Texas was the respondent (Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839), provide a reasonably good cross section of systems that have been scrutinized.

In this case we are confronted with what is charged to be a scheme in Dallas County, Alabama, to systematically exclude Negroes from juries, both on grand and petit juries solely because of their being Negroes.

Anderson moved (1) to quash the indictment, (2) to quash the petit jury venire, and (3) to declare void the composition of the jury sworn to try him.

We begin our enquiry by taking notice of the opinion of Mr. Justice Foster, then supernumerary, in Fikes v. State, 263 Ala. 89, 81 So.2d 303, 309, reversed on another ground, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246.

We refer to the Fikes opinion for two reasons. First, to call attention to the fact that the jury commission of Dallas county made up a new roll of jurors in October, 1953, so that no exclusion before that date would have any relevancy here. Second, we consider the opinion for the following finding as to the make up of the jury roll in October of 1953:

> "• • • The commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, and from which the venire was drawn which furnished the grand jury and petit juries here involved. There was nothing on the roll or cards which indicated their race. • • •"

The revision of the jury roll required to be made by statute every year consists primarily of adding names of men newly qualified, and the deletion of those who have died, become disqualified, or come under a statutory exemption. So that the annual book or roll carries over a great many names from a prior year. Therefore, we feel warranted in approaching this question in a case tried some five years after the Fikes trial in relying upon the finding of our Supreme Court in that case as an established foundation.

[12] Moreover, the movant in such a situation carries the burden of proof to adduce enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude.

We begin (also referring to Fikes opinion) with some of our jury statutes.

Code 1940, T. 30, § 21, as amended, gives the basic qualifications of jurors: (1) Sex: male; (2) age: 21-65; (3) general: generally reputed to be honest and intelligent * * * and esteemed in the community for their integrity, good character and sound judgment; (4) specific exclusions: (a) under age; (b) habitual drunkard; (c) afflicted with permanent disease or physical weakness rendering him unfit; (d) cannot read English—except freeholder or householder; (e) *ever* convicted of an offense involving moral turpitude. Note: This disqualification is not confined to felons nor to misdemeanants: "offense" includes breaches of ordinances where the substance of the charge involves moral turpitude. Cf. Beasley v. State, 39 Ala.App. 182, 96 So.2d 693 (adultery).

Code 1940, T. 30, § 24, requires the jury commission to seek out men so qualified and put their names on the jury roll and in the jury box.

Code 1940, T. 30, § 28, requires the commission to note disqualifications or exemptions opposite the names of those theretofore on the roll.

Code 1940, T. 30, § 3, as amended, exempts: (1) Judges; (2) attorneys; (3) officers of the United States; (4) officers of the executive department of the state government; (5) sheriffs; (6) deputies; (7) clerks of the courts; (8) county commissioners; (9) physicians; (10) dentists; (11) pharmacists; (12) optometrists; (13) teachers; (14) actuaries; (15) engineers of boats; (16) bus drivers (under Public Service Commission); (17) truck drivers (under Public Service Commission); (18) railroad engineers; (19) firemen; (20) conductors; (21) train dispatchers; (22) bus dispatchers; (23) railroad station agents; (24) telegraph operators; (25) newspaper reporters; (26) embalmers; (27) radio broadcasting engineers and announcers; (28) superintendents, physicians, and regular employees of Bryce and Searcy Hospitals; (29) officers and enlisted men of the national guard and naval militia; (30) and convict and prison guards.

Moreover, the jury commissioners have discretion to exclude men who would be subject to challenge either by statute or by common law for general grounds (aside from those arising from the peculiarities of a given suit, e. g., consanguinity or being a witness).

The statutory grounds of challenge which should keep a man's name from the roll are (Code 1940, T. 30, § 55, as amended):

> "1. That the person has not been a resident householder or freeholder of the county for the last preceding year.
>
> "2. That he is not a citizen of Alabama.
>
> * * * * *

"5. That he has been convicted of a felony.

* * * * *

"8. That he is under twenty-one, or over sixty-five years of age.

"9. That he is of unsound mind."

In Brown v. Woolverton, 219 Ala. 112, 121 So. 404, 406, 64 A.L.R. 640, we find:

"* * * The common-law grounds as far as applicable to our system and not changed by statute remain for our guidance. Our statute has added certain grounds of challenge for cause, but they are not exclusive of the common law remaining unchanged. * * *"

[13] Pardon of an infamous offense does not remove the ground for challenge. Brown v. Crashaw, 2 Bulstr. 154; Terry v. State, 25 Ala.App. 135, 148 So. 157, holds that a pardon will not cut off enquiry as to a witness's conviction of a crime involving moral turpitude. See also Mason v. State, 39 Ala.App. 1, 103 So.2d 337, affirmed 267 Ala. 507, 103 So. 2d 341.

When drawing a venire either for a grand or petit jury, the circuit judge pulls "without selection," i.e., blindly, cards with the jurors' names for the venire list to be summoned by the sheriff. The names of those who appear and are not excused from grand jury duty are drawn in open court from a hat or box. The first eighteen men so picked are the grand jury. Code 1940, T. 30, §§ 30 and 38.

Our statutes require that the cards that go into the jury wheel or box be white, all of the same size and texture. The only writing is the name, occupation, residence and place of business. Code 1940, T. 30, § 20, as amended.

It should be pointed out that no evidence is shown of any violation of any of these or related statutes.

First, Anderson adduced the testimony of the circuit solicitor who had been in office since August, 1954, and who attended the organization of grand juries in Dallas County twice a year. No Negroes had served on grand juries during that time. He had met court in Dallas County four times a year. Each and every venire from which both grand and petit jurors were selected contained a number of Negroes.

The solicitor recalled one case in which all of the Negroes on the venire requested the judge to excuse them. These excuses were granted, with the consequence that their withdrawal left no names of Negroes on the list.

On other occasions when grand juries were drawn, there were Negroes still left on the venire and their names were placed in the hat from which the grand jury was drawn.

Each venire contained an average maximum of seven or eight Negroes, with the normal total of the venire being around seventy summoned, less those who were not found by the sheriff.

On the present venire there were a number of Negroes, one of whom claimed exemption for over age; another, named Tom Waller, was drawn but had to be excused because of an attack; a third was excused on account of illness; and two more were left on.

The circuit clerk was called as a witness and on cross-examination stated that Negroes had been drawn every session of court since she began as clerk. She further testified that there was nothing on the cards drawn from the jury box to show whether the juror was black or white.

The secretary of the jury commission testified her duties were to type up the jury roll as it was given to her, type up the jury cards, write the commission minutes, and post the venire to the jury roll. She had no contact with the venire at all. The jurors were just names to her and there was no way to ascertain from their employment or

addresses, so far as she knew, as to their being black or white. Asked if she knew whether or not Negroes served on any grand jury since she went into her position in September, 1954, her answer was, "Not that I know of." However, it was not brought out that she had knowledge of who did or did not serve on grand juries.

The deputy solicitor was put on the stand and testified that he had been solicitor for "as many as ten, fifteen or twenty" years. During that period of time, he had known of a Negro *serving* once or twice in Dallas County. He stated that none had served in the last three years, including the grand jury which indicted Anderson. On cross-examination he stated that in approximately 1953 or the early part of 1954 there was a Negro who served on the jury at that time.

Anderson took the stand to show that he was a citizen of the city of Selma, Dallas County, Alabama, in the United States.

William H. Dinkins testified he had been a resident of Dallas County since 1894, except when he was in school and in the army. He attended Selma University and Brown University, from which he obtained a B. A. degree. Columbia University conferred upon him a Master of Arts degree. He was a member of Phi Beta Kappa.

Dinkins had never been convicted of any crime in Dallas County, and had never served a penal term in Dallas County. When asked if he had any personal knowledge of any Negroes serving on a jury in Dallas County, he answered, "I don't know anything about grand juries." He was then asked whether he knew of any Negro who had served on the grand jury in Dallas County, to which he answered, "No, sir." A like question as to petit juries was asked, to which he replied, "No." He further testified that he had never served on a grand or petit jury in Dallas

County, nor had he had any occasion of being excused from serving on a venire.

On cross-examination it was brought out that Dinkins was, at the time of the hearing, over age as a juror, aged sixty-eight and a half, and prior to that time had been a school teacher, hence exempt from jury duty under § 3, as amended, supra, at least while teaching.

The solicitor brought out that Dinkins did not know whether a Negro had ever served on the grand jury or not. Dinkins added, "I don't know anything about it."

On redirect examination, Dinkins was furnished a jury list for the February 23, 1959, term of criminal court which contained some sixty-eight names. No question pertinent to the issue raised by the motion was asked Dinkins with respect to this list.

Henry Sylvester Lawson had worked as a mechanic at a cotton seed oil mill and retired. He testified he had never served on a grand jury, but that he had served on a jury in a city court some ten or fifteen years ago. However, further questioning brought out that rather than being a juror, he was in that court in the capacity of a witness.

Lawson did not know any Negroes who had *served* on juries in Dallas County, and he "had just heard tell of some being called but they didn't serve."

John Brown had been summoned for Federal jury duty, but had never served on a State court jury, either petit or grand. When asked if he knew of any Negro who had served on such juries, he answered, "I can't remember. In fact, I haven't been around in court too much."

On examination by the court, it was brought out that Brown did not know whether Negroes had served on juries or not. The Federal venire on which Brown had been called consisted of thirty men, of whom two were Negroes. Brown did not serve on any panel.

The defendant then called the chairman of the jury commission who had been in office since April, 1954. He testified he had participated in preparing the jury rolls in Dallas County, had interviewed prospective jurors, and with the other two members of the commission met and decided when to add names to the list. He had never counted the number on the list. He gave as his estimate that one in ten jurors on the list was a Negro. The total number on the list he guessed at being around 1800.[4] He did not know of the composition of grand juries and petit juries.

In making up the list the chairman of the commission went about to different parts of the county, and where he knew "good men" he asked them about others, and the other commissioners apparently followed the same method. Then the names are entered on the list or roll and each name corresponds with a card that goes in the jury box.

The commissioners interviewed both white and Negro prospective jurors. Not all commissioners went into all precincts; nor did a commissioner, in visiting a precinct, attempt to visit every man over twenty-one years of age; rather the commissioners sought recommendations of persons known to them to be of good standing in each community.

It was brought out on cross-examination that the cards sent by the jury commission to go in the jury box to be drawn by the judge were all similar except for the name of each juror.

L. R. Harrison, a minister, pastor of Mt. Averett Baptist Church and of the True Vine Baptist Church, who had finished his schooling some three years before, testified that he knew of none of the members of his congregation in Dallas County who had served as jurors; nor had he ever served as a juror, nor been excused from

[4] In the Fikes case the ratio seemed to be 1 in 5.

jury service. He had not been convicted of a felony or crime involving moral turpitude, and did not drink or gamble. Furthermore, his father, who was also a minister, had never served as a juror in Dallas County.

James Black, who made his living by logging and owned timber land, testified he was forty-nine years of age; had never been convicted of a felony in Dallas County; had never served a term for more than a year in jail; had never been convicted of anything and given "that term" and given probation; was not an habitual drunkard; did not gamble; had not been arrested for gambling or loitering; could read and write English fairly good; had never served as a juror; had never been called to serve as a juror; did not know of any of his friends who had ever served on a grand or petit jury; nor had he personally been asked to be excused from so serving.

Black had no ailment or crippling disease that might have prevented him from so serving. He was a Mason. He did not know of any members of his lodge who had served as jurors, including the then Master.

On cross-examination Black testified he had never made an effort to find out anything about whether Negroes served on juries or not. He had never checked the list of jurors in Selma newspapers to see if any Negroes were on it. He did not know Roosevelt Dawson. He did know Tom Waller, who ran a dry cleaning plant, but he did not know that Waller had been subpoenaed for jury duty that week. He knew Percy Huckabee, but he did not know that Huckabee had been subpoenaed for jury duty that week. He did not know Young Childers, a farmer, nor did he know Bennie Phillips, who had apparently also been called.

A stipulation was made that the 1950 Federal census showed 6940 white males and 7956 colored males over the age of twenty-one years in Dallas County.

The State then put Terrell Hicks, assistant cashier of a Selma bank, who had served on a grand jury in January, 1954, on the stand. He recalled a Negro by the name of Roosevelt Dawson had served on that grand jury. On cross-examination he stated that he had no personal knowledge of any Negroes serving on a grand or petit jury thereafter. On redirect it was brought out that he had made no attempt to find out about grand juries other than the one on which he served.

The State then produced the sheriff who has held that office since November 8, 1955. We excerpt from his testimony:

"Q. Since November 8, 1955, have you ever served subpoenas when there was not negroes on the jury? A. Not to my knowledge.

* * * * *

"Q. Since November 8, 1955, when you became Sheriff, state the approximate percentage in your best knowledge have been negroes, negro prisoners and white prisoners?

"Attorney Gray: We object, unless he shows the age.

"Q. Over twenty-one years old? A. I will say it has been above eighty-five per cent negro.

"Q. And that includes all crimes? A. All crimes.

"Q. That leaves approximately fifteen per cent that are white. Are most of them Dallas Countians? A. No. I would say a large percentage of them is from Chilton County and some from Craig Air Force Base."

On cross-examination:

"Q. When you testified a moment ago as to the percentage of arrests you have made since you became Sheriff, you meant eighty-five per cent of the total number of arrests you have made have been negroes?

A. That is an estimate. They have been.

"Q. Would you say a large number of negroes you arrest are repeaters? A. To some extent, yes.

"Q. What percentage would you say? A. Well, it would be hard to say. I never tried to arrive at it.

"Q. Using the same judgment you used in arriving at the percentage of negroes, would you give your best judgment of the number who are repeats? A. I would say about the same percentage, number of negroes are repeats as the whites are repeats.

• • • • •

"Q. So you are not saying eighty-five per cent of the total negro population are criminals? Are you not saying they are? A. No; I am not."

Glenn H. Defke, Chairman of the Jury Commission, was recalled and testified:

"Q. Do you know of your own knowledge how many people at Martin's Station precinct, where you lived so long, are on the jury roll? A. I do know, yes, sir.

"Q. Is that the only one you absolutely know? A. Yes. That is the only one I am positive on.

"Q. How many people in that precinct are on the jury roll? A. Seven.

"Q. How many negroes? A. Four.

"Q. The other three are whites? A. That is right.

• • • • •

"Q. Captain, what is the policy of your Commission as to white preachers and white teachers, negro preachers and negro teachers? A. To leave them out of the jury box. If there has ever been one put in, it was an oversight.

"Q. On the list we have now was one man W. David Holloway, Plantersville, and it shows 'Preacher &

Teacher', did you know of your own knowledge when he was put on the list whether he was a preacher and teacher? A. No, sir, I did not.

"Q. And is it your policy to leave them both out? A. Yes.

"Q. Of both races? A. Yes."

On cross-examination:

"Q. Have you talked to negroes in Selma about prospective jurors? A. I have."

Lt. P. L. Pyron, City of Selma Police Department, deposed:

"Q. What is the percentage of the arrests that are colored and what are white? A. Well,—

• • • • •

"Q. Answer the question. A. I would say seventy-five to eighty per cent are negroes."

On cross-examination:

"Q. Are most of the persons you referred to in the seventy-five per cent persons who committed misdemeanors or felonies? A. That includes all arrests, felonies, misdemeanors, and also traffic.

"Q. Would you say traffic violations were a larger portion of that seventy-five per cent? A. Well, I would say fifteen or twenty per cent probably would be traffic.

"Q. And it also includes other petty crimes, classified as misdemeanors, does it not? A. That includes all the arrests."

The clause of the Fourteenth Amendment, § 1, which we consider here, reads:

"• • • No State shall • • • deny to any person within its jurisdiction the equal protection of the laws."

[14] The first and most obvious observation on this prohibition is that the denial must be by an action of the State and that this State action does not embrace denials which work discriminations which are purely private in nature.[5]

With this in mind, we review some of the decisions of the Supreme Court of the United States to find what actions by the States in particular cases were considered to have operated to exclude persons from jury service because of their race or color.

In Strauder v. State of West Virginia, 1879, 100 U.S. 303, 25 L.Ed. 664, judgment was reversed because the West Virginia jury statute provided "all white male persons who are twenty-one years • • • shall be liable to serve as jurors."

In Neal v. Delaware, 1880, 103 U.S. 370, 26 L.Ed. 567, the petitioner in error claimed that the Levy Court which acted as a jury commission purposefully excluded all Negroes from its consideration. This allegation was stipulated to have the effect of evidence. Cf. Hale v. Commonwealth of Kentucky, infra.

Gibson v. State of Mississippi, 1896, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075, was an affirmance of the Supreme Court of Mississippi. It was held that no discrimination was shown to justify removal to the Federal court. Cf. State of Virginia v. Rives, 1876, 100 U.S. 313, 25 L.Ed. 667.

Carter v. State of Texas, 1900, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839, appears to be a procedural decision, in that

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[5] State Action, 1 Race Relations Law Reporter 613. "Private" acts sanctioned by a State are not before us. See comment 34 N.Y.U.L.Rev. 152, and Horowitz, Misleading Search for "State Action," 30 So.Cal.L.Rev. 208.

a motion to quash the indictment was held not to be too late when addressed to the question of exclusion of Negroes from the grand jury. Cf. Michael v. State of Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, and Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77.

In Rogers v. State of Alabama, 1904, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (reversing judgment under an unpublished opinion, Ala.Sup.Ct., filed July 10, 1903), there was a motion to quash the indictment because the jury commissioners excluded from the grand juror list all colored persons. This decision, too, is a procedural one, inasmuch as the State moved in the trial court to strike the motion to quash, and the motion to quash was stricken from the files.

The Supreme Court of the United States, in effect, said that the motion to quash, though prolix, sufficed to raise the Federal question. It would appear from this case and from the Neal opinion that a mere allegation in conclusionary form is sufficient and the quo modo of the exclusion need not be pinpointed by a defendant.

In Martin v. State of Texas, 1906, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed. 497, the motion to quash the indictment because of exclusion of Negroes from the grand jury was overruled in the trial court. The State had taken issue, but Martin adduced no evidence in support of his motion. The court, per Mr. Justice Harlan, said:

> "• • • The trial court, it must be assumed from the record, had nothing before it, when deciding the motions to quash, except the written motions and the written answers thereto. • • • (200 U.S. at page 319, 26 S.Ct. at page 339)
>
> "• • • The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the 14th Amendment were violated." 200 U.S. at page 321, 26 S.Ct. at page 339.

Later cases cite Martin for the proposition that the defendant bears the burden of proof.

Norris v. State of Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074, reversing 229 Ala. 226, 156 So. 556. On the motion to quash the indictment returned by the grand jury to the Jackson County Circuit Court, Norris adduced evidence which tended to show that no Negroes had been called for jury service in that county in a long number of years. The books containing the jury roll were produced in court and there was a dispute touching entries therein as to the genuineness of the listing of names of six Negroes. This misprision, the Alabama Supreme Court implied, was the responsibility of the clerk of the board of jury supervisors. The Supreme Court of the United States considered Norris made out a prima facie case that there were qualified Negroes in the county, and that the State had failed to overcome this showing of an exclusion.

Hale v. Commonwealth of Kentucky, 1938, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050, reversing 269 Ky. 743, 108 S.W.2d 716. Hale's motion offered to prove that there were 8,000 Negroes in a population of 48,000, with 700 Negroes on the tax assessor's books as compared to 6,000 white persons. The jury wheel had 500 to 600 names, all of white citizens. Upon the Attorney General's stipulating that the motion could be taken as evidence, it was held that the Commonwealth had failed to overcome the prima facie showing of exclusion arising from the absence of the names of Negroes in the jury wheel.

Pierre v. State of Louisiana, 1939, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757, reversing 189 La. 764, 180 So. 630. Pierre moved to quash the indictment and the general venire from which both grand and petit juries came. The parish population included at least one-third Negroes. The trial judge sustained the motion to quash the petit jury panel and venire, but denied as to the grand jury, taking the

view that the indictment was not evidence of guilt.[6] Under the applicable Louisiana procedure, the jury commissioners pick the names of twenty qualified citizens. From these twenty the judge selects a grand jury foreman and the sheriff draws eleven more. From 1896 to 1936 no Negroes were ever selected by the commissioners.

The petit jury venire for December, 1936, contained the names of three Negroes out of some 300. One of these Negroes was dead, one was misnamed, and one was called for service in 1937. The population of St. John the Baptist Parish was twenty-five to fifty per cent Negro. The court, per Black, J., held that the quashal of the petit jury venire and panel imported evidence sufficient to quash the indictment, and also that the operation of the system of selection made a prima facie showing (unrebutted) that Negroes were systematically excluded from grand juries.

Smith v. State of Texas, 1940, 311 U.S. 128, 61 S.Ct. 164, 165, 85 L.Ed. 84, reversing 140 Tex.Cr.R. 565, 136 S.W.2d 842. Three thousand Negroes met the statutory qualifications for grand jurors. Between 1931 and 1938 only 5 of 384 grand jurors were Negroes. This disparity came from the commissioners putting Negroes last on the list of sixteen names where it was a uniform custom for the court to pick the first twelve names as the grand jury.

The court, per Black, J., remarked:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And

[6] Cf. Rives, J., in United States ex rel. Goldsby v. Harpole, 5 Cir., 263 F.2d 71, citing Jackson, J., dissenting in Cassell v. State of Texas, infra.

from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list."

Hill v. State of Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559, reversing 144 Tex.Cr.R. 415, 157 S.W.2d 369. Like Neal and Martin this is a case hinging on the quantum of proof. After showing there were over 55,000 Negroes in Dallas County, Hill was considered by the Supreme Court to have made a prima facie case of exclusion even after allowing for ineligibility.

No Negro had ever been summoned in some twenty or more years. The jury commissioners claimed lack of personal acquaintance.

The court, per Stone, C. J., rejoined (316 U.S. at page 404, 62 S.Ct. at page 1161):

"* * * The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. * * * Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn

whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified negroes available for jury service.

• • •"

Akins v. State of Texas, 1945, 325 U.S. 398, 65 S.Ct. 1276, 1278, 89 L.Ed. 1692, affirming 148 Tex.Cr.R. 523, 182 S.W.2d 723. Akins sought to quash the indictment because of an "alleged purposeful limitation on racial representation." Under the Texas practice shown, the trial judge appoints grand jury commissioners who select a list of sixteen persons from which twelve are chosen by the judge.

In this case the commissioners interviewed and chose only one Negro. This Negro the judge empaneled.

This case must be read with Cassell v. State of Texas, infra. In Akins there was a change shown from former complete exclusion. However, this change had not been practiced long enough for a statistical pattern negativing chance to have emerged.

Patton v. State of Mississippi, 1947, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, reversing 201 Miss. 410, 29 So.2d 96. There was evidence that for thirty years no Negroes had appeared on a jury. It appears that the Mississippi statute, unlike the Alabama statute, requires that a juror also be an elector. Negroes were shown to be registered poll tax paying voters. No evidence explained their absence from the venires. Cf. United States ex rel. Goldsby v. Harpole, supra, note 6.

Cassell v. State of Texas, 1950, 339 U.S. 282, 70 S.Ct. 629, 632, 94 L.Ed. 839, reversing 154 Tex.Cr.R. 648, 216 S.W.2d 813. Testimony showed that the jury commissioners of Dallas County, Texas, had taken the affirmance of Akins v. State of Texas, supra, to mean that the inclusion of one

Negro, no more and no less, did not mar indictment of a Negro by a grand jury so composed as denying equal protection. The majority opinion considered the commissioners were under a duty to familiarize themselves with the eligible jurors. In view of the size of the population of Dallas County, it was assumed that a large proportion of the Negroes were eligible. The majority said proportional limitation is no more permissible than is proportional representation mandatory. There must be "neither inclusion nor exclusion because of race."

In Avery v. State of Georgia, 1953, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244, there was a drawing from a jury box containing white and yellow tickets. The white tickets were for members of the white race and the yellow for Negroes. This system was held to be prima facie evidence of discrimination, and it mattered not that the judge who drew the tickets in no way chose between white and yellow.

Brown v. Allen (Speller v. Allen, Daniels v. Allen), 1953, 344 U.S. 443, 73 S.Ct. 397, 417, 97 L.Ed. 469. (Habeas corpus denied to examine North Carolina sentences after exhaustion of State procedure.)

In the Brown case confinement of the selection of jurors for grand and petit juries to taxpayers in Forsyth County was held not to be discriminatory per se.

In the Speller case the fact that there were dots on scrolls bearing the names of Negroes was held to be immaterial. "The jury box was produced in court, opened, and counsel for defendant permitted to examine the scrolls." The selection of the venire was made by a child's drawing the names from the box. The court, in referring to the undisputed prior exclusion, stated (344 U.S. at page 479, 73 S.Ct. at page 418):

> "* * * Former errors cannot invalidate future trials. * * *"

Hernandez v. State of Texas, 1954, 347 U.S. 475, 74 S.Ct. 667, 671, 98 L.Ed. 866, reversing 160 Tex.Cr.R. 72, 251 S.W.2d 531. A motion to quash the indictment and the jury panel because of the systematic exclusion of persons of Mexican descent from (a) jury commissioners, (b) grand jurors, and (c) petit jurors. The court, per Warren, C. J., referred to the pattern of proof in Norris v. State of Alabama, supra, and described this as the "rule of exclusion," which the State had not explained as due to circumstance or chance.

Reece v. State of Georgia, 1955, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77, reversing 211 Ga. 339, 85 S.E.2d 773, is a preliminary procedure case companion to Michel v. State of Louisiana, supra, and turns more on the due process clause for decision, although the question raised in the court below, which was overruled for procedural reasons, was one coming under a charge of systematic exclusion of Negroes from the grand jury. The ratio decidendi of this case affords no precedent here.

In Eubanks v. State of Louisiana, 1958, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991, reversing 232 La. 289, 94 So.2d 262, there was a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury in Orleans Parish. The system of selection resembled that in Pierre v. State of Louisiana, supra, in that a jury commission selects the names of not less than 750 persons competent to serve as jurors. From this list the commission semi-annually draws the names of seventy-five persons. A judge of the criminal court picks a twelve-man grand jury from these seventy-five. The court said (356 U.S. at page 586, 78 S.Ct. at page 972):

> "* * * Obviously the judges have broad discretion in selecting from the list * * * Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge

who chose the jury that tried petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community. Petitioner does not challenge this system of choosing grand jurors, as such, but he does contend that it has been administered by the local judges so that * * * (Negroes) have been systematically excluded * * *"

The court continued (356 U.S. at page 587, 78 S.Ct. at page 973):

"* * * We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the list submitted to the various local judges. * * *"

An analysis of the statutory method of picking jurors shows that the Alabama statutory scheme compares most nearly to that shown in the North Carolina case of Speller v. Allen, supra.

We have here no question of statutory exclusion, directly or indirectly. We do not require jurors, even those who cannot read or write English, to be property owers. We do not require jurors to be registered voters.

However, our statutes and decisions are replete with qualitative standards to bar those convicted of various felonies, misdemeanor and municipal offenses. The jury statutes probably also confer far too many occupational exemptions.[1]

The only opportunities, under the Alabama statute, for a system of exclusion to operate would be either in (a)

[1] Jones, Trial by Jury in Alabama, 8 Ala.L.Rev. 274.

fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel, or (b) a deliberate wilful passing over all qualified Negroes in making up the original list.

It is noteworthy in this case that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they might be examined for the presence or absence of Negroes.

Indeed, the State's evidence undisputedly showed that there were Negroes on the jury rolls. There was uncontroverted testimony that each venire contained an average maximum of seven to eight Negroes.

[15] In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries (Draper v. State, 250 Ala. 679, 36 So.2d 73), and the same rule obtains in the selection of grand juries.

[16] That in the last five years Negroes have, in many instances, asked to be excused from jury service in Dallas County, is not a showing of any action on the part of the State of Alabama or any of its officials to exclude them from juries.

[17] The record does not show how the State and the defendant chose to exercise the strikes as to the array for the petit jury. See Code 1940, T. 30, § 60, as to striking jurors in noncapital criminal cases; § 64, capital cases. If this were to have been made a point upon appeal, the record could and should have been required so to show. Vernon v. State, 245 Ala. 633, 636, 18 So.2d 388.

Unlike Texas or Louisiana, the members of a grand jury are not selected vis-a-vis any official of the State other than upon their first going upon the roll. Our trial judge, after hearing requests for excuses, has the names of all

the veniremen placed in a hat or box and then proceeds to draw names.

No allegation is made in this case that there was any form of selection other than by lot. There was nothing such as white and yellow cards or "marked decks," so that no question arises as to the drawing of the venire or of the grand jurors from the hat or box. This results then in leaving open as the only point of enquiry whether or not the jury commissioners have any system or scheme for excluding Negroes from the rolls.

[18] We consider the trial judge did not abuse the discretion confided in him and came to a reasonable conclusion based on substantial evidence. Among our reasons for so believing are:

[19] 1. The trial judge was entitled to take judicial knowledge of the size of the jury roll, which was testified to comprise some 1800 names, from his acquaintance therewith in drawing from the jury wheel or box for the various venires. This knowledge also was available to him from the published opinion of our Supreme Court in the Fikes case in which it was pointed out that of some 1500 names on the jury list at that time 250 to 300 were of Negroes.

[20] 2. The trial judge was entitled to take judicial knowledge of the existence of the names of Negroes on the jury roll from the fact that Negroes appeared on the venires attending the court in substantial numbers.

3. That the ration of white jurors to Negro jurors should be greater than in proportion to the ration of white men to Negro men because of, among other pertinent factors, the undisputed evidence of a greater number of arrests of Negroes by the law enforcement officers of Dallas County and the city of Selma. Even with an allowance for re-

peaters, substantially more (and out of population proportion) of the persons arrested were Negroes.

4. The trial judge was entitled to consider from his own knowledge as presiding judge over trials of felonies and misdemeanors as to the proportion of persons convicted as between white and Negro defendants, a matter on which no evidence was offered by either side.

5. The trial judge was entitled to take into consideration the failure of Anderson to establish any coercion or inducement on the part of any state, country, or local official or of any conduct condoned by them which would cause Negroes to seek to excuse themselves from jury duty in Dallas County, Alabama.

6. The trial judge was entitled to take into consideration the failure of Anderson to ask for the production of the jury rolls themselves for examination in open court. The Alabama law generally prefers as evidence where possible that which admits of less argument and dispute, and the jury rolls themselves would have afforded a much more authoritative solution than is given by hearsay and repute.[8]

We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama.

Accordingly, the judgment below is due to be Affirmed.

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[8] Shepherd v. Sartain, 185 Ala. 439, 64 So. 57; Code 1940, T. 30, § 20, as amended, last sentence; State ex. rel. Denson v. Miller, 204 Ala. 234, 85 So. 700; Norris v. State of Alabama, supra.

Judgment of the Circuit Court

CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
DALLAS COUNTY, ALABAMA

February 27, 1959.

Comes the State of Alabama, by its solicitors and also comes the defendant Lewis Lloyd Anderson in his own proper person and by and with his attorneys, and being duly and legally arraigned in open court upon the indictment in this cause, for answer to said indictment, pleads and says that he is not guilty in manner and form as charged therein; and issue joined:

Thereupon came a jury of good and lawful men, to wit: Paul M. Friday, and 11 others, who having been impaneled and duly sworn according to law, on their oaths say,

> "We the jury find the defendant guilty of manslaughter in the first degree as charged in the indictment, and fix his punishment at imprisonment in the penitentiary of Alabama for 10 years. Paul M. Friday, Foreman."

SENTENCE

And now on this day to wit: February 27, 1959, the defendant, Lewis Lloyd Anderson, being personally present in open court and being attended by his attorneys was asked by the court if he had anything to say why the sentence of the law should not be pronounced upon him. And he said, "I do not think I got justice." It is therefore considered and adjudged accordingly by the court that the defendant is guilty

of manslaughter in the first degree as charged in the indictment and as punishment for said offense the defendant is sentenced to imprisonment in the penitentiary of Alabama for 10 years.

ORDER OF THE COURT

February 27, 1959. The defendant in open court gave notice of and takes an appeal in this cause to the Court of Appeals in Alabama and on motion of the defendant made in open court the sentence in this cause is suspended pending said appeal, and the defendant's appeal bond, is fixed by the court at the sum of $3,000 to be continued as is required by law.

/s/ L. S. MOORE
Judge

Opinion of the Alabama Supreme Court

LEWIS LLOYD ANDERSON

v.

STATE OF ALABAMA.

2 Div. 411.

Supreme Court of Alabama.

March 17, 1960.

Rehearing Denied, May 19, 1960.

• • • • •

GOODWYN, Justice.

The appellant in the Court of Appeals has petitioned us for a writ for certiorari to review the opinion and decision of that court in the case of Anderson v. State of Alabama, 120 So.2d 397.

Petitioner avers in his petition "that he has filed his application for rehearing in said Court of Appeals, within the time required by law, and that said application for rehearing in the Court of Appeals was overruled on the first day of December, 1959." The State has filed a motion to strike the petition on the ground that it fails to comply with Rule 39 of the Revised Rules of the Supreme Court, Code 1940, Tit. 7 Appendix, "in that there does not appear on the face of the application for certiorari that application has been made to the Court of Appeals for a rehearing *of the point or decision complained of*, but merely shows that an application for a rehearing was made in the Court of Appeals."

Rule 39 provides that an application for the writ of certiorari to the Court of Appeals will not be entertained

or considered, "unless it appears upon the face of the application therefor that application has been made to said court of appeals for a rehearing *of the point or decision complained of*, * * *." (Emphasis supplied.)

The provisions of Revised Rule 39 (formerly Rule 44) have been in effect for many years. From the wording of the rule it is not clear what was intended by requiring that the application for certiorari show on its face that a rehearing has been sought in the Court of Appeals "of the point or decision complained of." There is some basis for construing it as requiring a reconsideration by the Court of Appeals of the specific points presented for review on certiorari as a prerequisite to a review of such points by the Supreme Court. However, it has not been so construed by this court. We have consistently considered petitions for certiorari when it is shown that there has been an application for a rehearing of the case in the Court of Appeals and a denial of rehearing by that court. While, in reviewing an opinion and decision of the Court of Appeals, we have limited our review to the points included in the petition for certiorari and insisted on in brief, we have not required, as a requisite to jurisdiction, a showing that the specific points included in the petition for certiorari must first have been presented on rehearing in the Court of Appeals.

The motion to strike is denied. All the Justices concur.

On consideration of the petition for certiorari, our conclusion is that the writ is due to be denied.

Writ denied.

SIMPSON, STAKELY and MERRILL, JJ., concur.

* * * * *

ILE COPY

Supreme Court, U.S.
FILED
SEP 29 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 326

LEWIS LLOYD ANDERSON,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement	2
Summary of Argument	4
Argument	5
Conclusion	14
Certificate	15

TABLE OF CASES CITED

Page

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286 ..... 4, 7

Lewis Lloyd Anderson v. State, 120 So. 2d 397, Cert. den. 20 So. 2d 414 ..... 1, 4, 10

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 ..... 4, 6

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629 4

Fikes v. State, 263 Ala. 89, 81 So. 2d 303, 309, Reversed 352 U. S. 191 ..... 4, 9, 10

Kennedy v. State, 186 Tenn. 310, 210 S. W. 2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659 4

People v. Price, 371, Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 661, 84, L. Ed. 463, 60 S. Ct. 94 5

Smith v. Mississippi, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900 ..... 5, 6

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402 ..... 5, 10

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383 ..... 5, 6

STATUTES CITED

Code of Alabama 1940, Title 14, Section 320 2

Code of Alabama 1940, Title 30, Section 3, as amended 6

Code of Alabama 1940, Title 30, Section 46 7

Code of Alabama 1940, Title 30, Section 60 12

Code of Alabama 1940, Title 30, Section 64 12

United States Code:
Title 28, Section 1257 (3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 326

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

Lewis Lloyd Anderson v. State of Alabama, 2nd Division 16, 120 So. 2d 397. The opinion of the Supreme Court of Alabama is set forth in 120 So. 2d 414.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered on November 10, 1959. Application to the Court of Appeals of Alabama for rehearing was denied on December 1, 1959. A petition to the Supreme Court of Alabama for writ of certiorari was denied on March

17, 1960, and application to the Supreme Court of Alabama for rehearing was denied on May 16, 1960. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

The petition in this case raises the following issue:

Whether the petitioner, who stands convicted in the State of Alabama of first degree manslaughter, as defined by Title 14, Section 320, Code of Alabama 1940, was indicted by a grand jury and convicted by a petit jury from which Negroes were systematically excluded by the Jury Commission of Dallas County, contrary to the provisions of the Fourteenth Amendment. The State of Alabama contends that Negroes were not systematically excluded from jury service on said juries.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Dallas County, Alabama, of first degree manslaughter and sentenced to ten years' imprisonment. Before entering upon the trial in said Circuit

Court, the petitioner filed motion to quash the indictment. He also filed a motion to quash the venire, followed by a motion to declare void the composition of the jury sworn to try the defendant, all motions alleging systematic exclusion of Negroes from jury services. After hearing the testimony and considering the evidence offered by both petitioner and the State, the trial court overruled the motions. The excellent opinion of Judge Cates of the Court of Appeals of Alabama is full, comprehensive and complete and fully answers the contentions of petitioner in this Court.

At the conclusion of preliminary motions, petitioner entered a plea of not guilty. Trial was had before a jury which found petitioner guilty of manslaughter in the first degree and fixed his punishment at imprisonment in the Penitentiary of Alabama for ten years. The Court thereupon adjudged petitioner guilty of manslaughter in the first degree and sentenced him to ten years' imprisonment. Petitioner gave notice of appeal in open court and service of sentence was suspended pending appeal. Motion for new trial was overruled. The judgment and sentence of the lower court was affirmed by the Court of Appeals of Alabama, rehearing therein denied, petition to the Supreme Court of Alabama for writ of certiorari was denied and application to that court was subsequently denied, hence this petition for writ of certiorari.

The evidence was that on January 20, 1959, prosecution witnesses saw petitioner driving a car along Minter Street in Selma, Alabama, headed east at a speed of between sixty and seventy miles per hour; that Minter is an unpaved street in bad condition because of damp weather; that petitioner got to the cor-

ner of Church Street, ran into the front bumper of a green Chevrolet headed north on Church; that the momentum carried petitioner's car down Minter Street, where it swung to the right, then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit and fatally injured Tom Reese, a Negro. After swerving to the right side of the street, it went back into the road again, on to the end of the block where it hit a tree, bounced four feet in the air and turned over. The defense was that the collision with the green Chevrolet was accidental, that petitioner was not speeding and that petitioner was knocked unconscious at the time of first impact. The conflict in evidence presented a jury question and the jury's verdict was that petitioner was guilty of manslaughter in the first degree.

VI

SUMMARY OF ARGUMENT

The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were arbitrarily or systematically excluded, in violation of the Fourteenth Amendment, from service either on the grand jury which indicted the petitioner or the petit jury which convicted him. **Akins v. Texas,** 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286; **Lewis Lloyd Anderson v. State,** 120 So. 2d 397, Cert. den. 120 So. 2d 414; **Brown v. Allen,** 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; **Cassell v. Texas,** 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629; **Fikes v. State,** 263 Ala. 89, 81 So. 2d 303, 309, Reversed 352 U. S. 191; **Kennedy v. State,** 186 Tenn. 310, 210 S. W.

2d 132, Cert. den. 333 U. S. 846, 92 L. Ed. 1129, 68 S. Ct. 659; **People v. Price,** 371 Ill. 137, 20 N. E. 2d 61, Cert. den. 308 U. S. 551, 84 L. Ed. 463, 60 S. Ct. 94; **Smith v. Mississippi,** 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; **Tarrance v. Florida,** 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; **Thomas v. Texas,** 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383.

VII

ARGUMENT

In his petition for writ of certiorari to review the judgment of the Court of Appeals of Alabama, the petitioner contends that Negroes were systematically excluded from jury service in Dallas County, Alabama, and that, because of such exclusion, he was denied the due process and equal protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in his trial and conviction of manslaughter in the first degree. Before he was placed on trial, petitioner filed in succession motions to quash the indictment, to quash the venire, and to declare void the composition of the jury sworn to try him. Alleged systematic exclusion of Negroes from the jury rolls was the basis of these motions. The testimony of a number of witnesses was heard by the trial court on said motions and they were overruled. The respondent submits that this ruling was not error and involves no denial of due process or equal protection of law guaranteed by the Fourteenth Amendment, for the reason that the evidence fails to show that the jury commission systematically omitted qualified and not exempt negroes from the jury roll because they were Negroes or discriminated against them on that account.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged discrimination is on the one making the allegation. **Smith v. Mississippi**, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900. The respondent submits that the burden was not met by the petitioner.

The evidence further showed that the Jury Commissioners of Dallas County, Alabama, had adopted a policy not to include those persons, white and Negro, qualified for jury service on the jury roll who were exempt from such service by reason of Title 30, Section 3, Code of Alabama 1940, as amended. The evidence showed that those responsible for obtaining jurors had fairly and honestly attempted to carry out their duties. Where that is shown this Honorable Court has held in **Thomas v. Texas**, 212 U. S. 278, 53 L. Ed. 512, that there was no evidence of discrimination.

Petitioner contends that the lack of proportional representation of Negroes on the jury roll infers discrimination. Both the courts of Alabama and the Supreme Court of the United States have held that the lack of proportional representation alone does not constitute discrimination. In **Brown v. Allen**, 344 U. S. 443, 97 L. Ed. 469, where defendant contended that discrimination was proved by evidence that thirty percent of those eligible as jurors were Negroes, while only seven percent of the names in the jury box were Negroes, a majority of the Court held that no discrimination against Negroes in the selection of the jury had been shown.

Evidence was brought out that each venire con-

tained an average maximum of seven or eight Negroes, with the normal total of the venire being around seventy summoned less those not found by the sheriff, and that on the present venire there were a number of Negroes.

In motions such as filed before the trial court, the movant carries the burden of proof to offer enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude. Respondent submits that the trial court's action in overruling the motions was rightly affirmed by the Court of Appeals of Alabama. As was stated in **Akins v. Texas**, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286:

> "While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect (citing cases) we accord in that examination great respect to the conclusion of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

Petitioner contends that the failure to include every eligible Negro male citizen over twenty-one shows a systematic exclusion of Negroes from the jury roll. There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud in drawing or summoning the jurors. Title 30, Section 46, Code of Alabama 1940. Equally illogical is the statement

that at least fifty-three percent of the eligible Negroes are potentially qualified for jury service.

Petitioner, in support of his contention that Negroes were systematically excluded from jury rolls, refers to testimony of the Jury Commission Chairman that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. He tries to show this to be similar to the exclusion as shown in **Hill v. Texas.**

A reading of the testimony of Glenn H. Defke on cross-examination disclosed the following which dispels the inference of the phrase quoted by petitioner:

"Q. Do you know all the negroes in all the precincts in Dallas County?

"A. No. I do not believe anybody does. (R.p.61)

"Q. What do you do about the precincts where you don't know the negroes?

"A. Ask some good white man.

"Q. And they in turn suggest names?

"A. Yes.

"Q. Would you say that you rely mostly on what you get from such good white men in their precincts in determining your jurors?

"A. Well, I would say what I get all together about white men, but non-white, I talk to some good folks in the country and some here in town.

"The Court: You mean good citizens in town.

"A. Yes, about non-whites. I know good citizens I talk to and advise about some of the folks to be put in the box and some left out.

"Q. Have you talked to negroes in Selma about prospective jurors?

"A. I have." (R. p. 62)

And on re-direct examination:

"Q. (By Mr. McLeod) This roll you testified you keep and cards you keep, is there any way you can look at these cards, and unless you know that person personally, can you tell whether it is a negro or white man?

"A. You certainly cannot. There is no identification as to race put on the cards at all." (R. p. 63.)

Clarification of the footnote contained on page 9 of petitioner's brief appears in order. It reads as follows:

"2 The opinion in Fikes v. Alabama, 81 So. 2d 303, 309, confesses that 'There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race.'"

A reading of the opinion discloses that the Supreme Court of Alabama was referring to the jury rolls prior to the revised jury roll, which revision was made in October, 1953. The Court further said:

"It may be Negroes were systematically omitted prior to the roll made in October, 1953,

but that was not true in making up that particular roll."

Fikes v. State was reversed by this Honorable Court on another ground, that of the confession being involuntary. 352 U. S. 191.

In the absence of evidence to the contrary, there is a presumption or inference that the officers in charge of the selection and summoning of the jury have performed their duty fairly and justly without discrimination against eligible class or race. **Tarrance v. Florida,** 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

In support of his petition for writ of certiorari, petitioner cites numerous cases in an attempt to show that this case is so similar that a writ of certiorari should be granted. Cases cited by petitioner include such instances as where a jury statute provided that "all white males who are twenty-one years . . . shall be liable to serve as jurors," where no Negro had ever been known to have been on the jury roll, where payment of poll tax was a consideration, where jury box had either different colored or marked cards to distinguish Negro voters, where the judge selected the jury from cards drawn out by him and basing his selection on personal knowledge or reputation in the community, where a token number of Negroes were placed on the jury roll, etc. None of these instances referred to by petitioner in his brief were shown by the evidence to have existed.

Each contention of the petitioner has been fully answered in the opinion of the Court of Appeals in **Lewis Lloyd Anderson v. State,** 120 So. 2d 397, Cert. den. 120 So. 2d 414 (also in appendix to petition for

writ of certiorari), and for sake of brevity is incorporated into this brief by reference. In particular, the following part of such opinion is quoted as follows:

> "An analysis of the statutory method of picking jurors shows that the Alabama statutory scheme compares most nearly to that shown in the North Carolina case of Speller v. Allen, supra.
>
> "We have here no question of statutory exclusion, directly or indirectly. We do not require jurors, even those who cannot read or write English, to be property owners. We do not require jurors to be registered voters.
>
> "However, our statutes and decisions are replete with qualitative standards to bar those convicted of various felonies, misdemeanors and municipal offenses. The jury statutes probably also confer far too many occupational exemptions.
>
> "The only opportunities, under the Alabama statute, for a system of exclusion to operate would be either in (a) fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel, or (b) a deliberate wilful passing over all qualified Negroes in making up the original list.
>
> "It is noteworthy in this case that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they

might be examined for the presence or absence of Negroes.

"Indeed, the State's evidence undisputedly showed that there were Negroes on the jury rolls. There was uncontroverted testimony that each venire contained an average maximum of seven to eight Negroes.

"(15) In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries (Draper v. State, 250 Ala. 679, 36 So. 2d 73), and the same rule obtains in the selection of grand juries.

"(16) That in the last five years Negroes have, in many instances, asked to be excused from jury service in Dallas County, is not a showing of any action on the part of the State of Alabama or any of its officials to exclude them from juries.

"(17) The record does not show how the State and the defendant chose to exercise the strikes as to the array for the petit jury. See Code 1940, T. 30, § 60, as to striking jurors in noncapital criminal cases; § 64, capital cases. If this were to have been made a point upon appeal, the record could and should have been required so to show. Vernon v. State, 245 Ala. 633, 636, 18 So. 2d 388.

"' Jones, Trial by Jury in Alabama, 8 Ala. L. Rev. 274."

Respondent contends that there was not shown

any proof of systematic exclusion of Negroes from the Grand or Petit Juries in Dallas County, Alabama, and that the evidence shows that the trial court properly ruled on the motion to quash the indictment, motion to quash the venire and motion to declare void the composition of the jury sworn to try the defendant.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the petitioner was indicted, tried, convicted and sentenced properly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, the writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE

I, MacDonald Gallion, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1960, I served a copy of the foregoing brief and argument on one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Fred D. Gray
34 North Perry Street
Montgomery, Alabama

.....
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FILED
MAR 2 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 326

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

PETITIONER'S BRIEF

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Summary of Argument	8
Argument	8
Conclusion	14
Appendix	15

CITATIONS:

Cases:

Avery v. Georgia, 345 U.S. 559	13
Cassell v. Texas, 339 U.S. 282	11, 12, 13
Eubanks v. Louisiana, 356 U.S. 584	12, 13, 14
Fikes v. State, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U.S. 191	6, 8, 11
Hernandez v. Texas, 347 U.S. 475	13
Hill v. Texas, 316 U.S. 400	9, 11
Neal v. Delaware, 103 U.S. 370	9, 13
Pierre v. Louisiana, 306 U.S. 354	9
Reece v. Georgia, 350 U.S. 85	9, 13
Shepherd v. Florida, 341 U.S. 50	11
Smith v. Texas, 311 U.S. 128	9, 13
Strauder v. West Virginia, 100 U.S. 303	12 13

PAGE

Statutes:

28 U.S.C. §1257(3) 1
Tit. 30 Ala. Code of 1940, §3 as amended 4, 15
Tit. 30 Ala. Code of 1940, §18 as amended 10, 15
Tit. 30 Ala. Code of 1940, §20 as amended 10, 16
Tit. 30 Ala. Code of 1940, §21 as amended 10, 17

Miscellaneous:

Ala. Rep. Atty. Gen. 1936-38, p. 355 10

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The opinion of the Alabama Court of Appeals is reported in 120 So. 2d 397. The opinion of the Supreme Court of Alabama is reported in 120 So. 2d 414.

Jurisdiction

The judgment of the Alabama Court of Appeals was entered on November 10, 1959. R. 64-91. A petition to the Supreme Court of Alabama for writ of Certiorari was denied on March 17, 1960, R. 99, and application to the Supreme Court of Alabama for rehearing was overruled on May 19, 1960, R. 100. The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1257(3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States.

Question Presented

Whether the practice of the Dallas County, Alabama, Jury Commission in preparing the jury roll, according to which no Negro has ever served on a petit jury and only one has ever served on a grand jury, constitutes such arbitrary and systematic exclusion of Negroes as to have denied petitioner the equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Title 30, Alabama Code of 1940, Sections 3, 18, 20 and 21. These statutory provisions are set forth in the Appendix, *infra*, p. 15.

Statement

The judgment of the Alabama Court of Appeals, Second Division, entered in this case on November 10, 1959, affirmed a judgment and sentence of the Circuit Court of the Fourth Judicial Circuit in and for Dallas County, Alabama, adjudging the petitioner guilty of first degree manslaughter, and sentencing the petitioner to ten years' imprisonment (R. 8-9).

Execution and enforcement of the judgment of the Alabama Court of Appeals was stayed on May 27, 1960, by Presiding Judge of the Alabama Court of Appeals Robert G. Harwood, "for 90 days from the 19th day of May 1960, to enable appellant (petitioner) herein, to apply for and

obtain, if he can, a review of said cause by the Supreme Court of the United States, . . ."

The circumstances leading up to this judgment are as follows:

The petitioner, a Negro minister, owned a 1956 Black Lincoln Premier (fols. 96, 113, 121, 155). On January 20, 1959, while driving along a street in Selma, Alabama, he struck and killed one Tom Reese. As a result, he was indicted by a Dallas County grand jury for Murder in the 2nd degree, which true bill included the lesser charges of voluntary and involuntary manslaughter. The petitioner entered a plea of not guilty (fol. 3).

No Negro has ever served on a petit jury in Dallas County, and only one Negro reportedly ever served on a Dallas County grand jury. For this reason, petitioner, prior to trial on the merits, filed a motion to quash the indictment on the ground that Negroes were systematically excluded from the grand jury service in Dallas County solely because of their race and color. The motion included allegations that no Negro had served on the grand jury which had indicted him although Negro males qualified under the state law to serve outnumbered qualified whites. Petitioner declared that the methods followed by the Jury Commission of Dallas County in selecting the names of Negroes to be placed on the jury roll was highly irregular, arbitrary and contrary to the method prescribed by the laws of the State of Alabama and the Constitution of the United States (R. 2-4). Petitioner also filed a motion to quash the venire (R. 5-6), and later filed a motion to declare void the composition of the jury sworn to try the defendant, both on the constitutional allegations of systematic exclusion of Negroes from jury service (R. 7-8).

To prove racial discrimination, the petitioner introduced the 1950 Federal Census reporting 6,940 male whites over twenty-one years of age in Dallas County, Alabama, and

7,956 male Negroes over twenty-one years of age in Dallas County (R. 44-45). The Solicitor for the Fourth Judicial Circuit which includes Dallas County, admitted that since he took office in 1954, no Negroes have served on the grand juries which are organized twice a year (R. 12-13). The Solicitor also testified that each venire contains about 70 names, that an average of six or seven of these are Negroes, and that while some of these ask to be excused, names of the others are placed in the hat from which the grand jury is drawn (R. 13-15). He reported (R. 14-16) that to his knowledge there were five Negroes on the venire drawn for the trial of this case, two were excused for illness, one claimed an over age exemption, and two remained on the venire. No Negro served on the grand jury in this case.

Two other court officials admitted that they could not recall any Negroes having served on a grand jury, while a third, a Deputy Circuit Solicitor, could recall only one Negro whom he believed had served on a grand jury in 1954 (R. 18). The Circuit Clerk, who served from 1950 to 1953 as secretary to the Jury Commission, could not recall any Negroes ever serving on grand juries. She maintained, however, that there was no racial identification on the jury cards (R. 15-16).

Five Negroes who were long-time residents of Dallas County and eligible for jury service, reported that they had never served on any jury and knew of no Negroes who had performed jury service (R. 20-23, 28-32, 37-42). One man held an M.A. degree, Phi Beta Kappa membership, and had lived in Dallas County for 65 years. On cross-examination, the State pointed out that this witness until the age of 60 had been a teacher and thus exempt from jury service (R. 21-22).[1] The Chairman of the Dallas County

[1] Among the classes of persons exempt from jury service under Alabama law unless by their own consent are: "teachers while actually engaged in teaching;" Tit. 30 Ala. Code of 1940, §3 as amended.

Jury Commission reported that the Commission followed a policy of not placing the names of exempt persons on the jury roll (R. 51-52), but petitioner introduced the jury list for the February 23, 1959 term of court, which list contained the name of one "W. David Holladay, Preacher and Teacher" who had been called for the present session of the court (R. 24). The record indicates that Mr. Holladay was white. The Jury Commissioner admitted as much, but explained that the white preacher-teacher's name had been placed on the roll "by mistake" (R. 52).

The Jury Commission chairman, who had held his post since 1954, stated that he thought that there were 1800 names on the jury roll, but also admitted that only one out of twelve was a Negro (R. 34). He said that in obtaining names for the jury rolls, both Negro and white prospective jurors were interviewed, and that he relied on recommendations of citizens who were "high class folks in various parts of the County, . . . " (R. 35-36).

He reported that he talked to persons all over the county about prospective jurors; and that in those precincts where he didn't know the Negroes, he would "ask some good white man" who would suggest names (R. 51-53).

He also reported that of those persons he checked, the ratio between whites and colored who had been convicted of crime was "eight or ten to one in favor of the whites" (R. 51). The Sheriff of Dallas County also estimated that 85% of the arrests he made were Negroes, although he admitted that some were repeaters, and that he did not mean to indicate that 85% of the total Negro population were criminals (R. 48-50). There was no evidence concerning what proportion of the Negro population had been convicted of crime.

The State called a witness who reported serving on a grand jury in Dallas County during January 1954, at which time one Negro also served on the grand jury (R. 45-46).

After hearing the testimony and considering the evidence offered by petitioner and the state regarding the above motions, the trial court overruled them (R. 5, 7, 8). On appeal in the Alabama Court of Appeals this point was again urged and it was held that the petitioner failed to carry the burden of proving that there was any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excluded or limited the number of Negroes available for jury service in Dallas County, Alabama. (R. 91).

The Alabama Court of Appeals in determining that petitioner failed to prove that there was any scheme which excluded or limited the number of Negroes available for jury service in Dallas County, referred to the Supreme Court of Alabama's opinion in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U. S. 191, "to call attention to the fact that the jury commission of Dallas County made up a new roll of jurors in October 1953, so that no exclusion before that date would have any relevancy here" (R. 70-71), and further considered that opinion for a finding as to the make up of the jury roll in October of 1953:

> ". . . The Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, . . ." (R. 71).

The Alabama Court then concluded that except for the adding of names of men newly qualified, and the deletion of those who have died or become disqualified, as required annually by statute, the basic makeup of the jury roll would not be changed. (R. 71).

The federal question concerning the right to be indicted by a grand jury and tried by a petit jury from which members of the petitioner's race have not been arbitrarily and

systematically excluded because of their race or color was properly raised before the Alabama Court of Appeals and disposed of adversely to petitioner's contentions. This is demonstrated in the opinion of the Alabama Court of Appeals (R. 64-91) and is largely described by the following quotation:

> "We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama" (R. 91).

The issue of racial discrimination in jury selection as prohibited by the equal protection clause was first raised prior to the trial at which time petitioner submitted motions to quash the indictment (R. 2-4), quash the venire (R. 5-6), and to declare void the composition of the jury as sworn (R. 7-8). The trial court overruled each of these motions (R. 5, 7, 8). Following the verdict, petitioner submitted a motion for a new trial (R. 9-11). Paragraphs 8, 10, 12, 13 and 14 of this motion alleged deprival of the equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution in that petitioner was indicted and tried by juries from which members of his race were arbitrarily and systematically excluded because of their race or color as set forth therein in some detail. This motion for a new trial was overruled and exception was made thereto (R. 11). A writ of certiorari by petitioner to the Supreme Court of Alabama (R. 93-96), specifically raising the jury discrimination point, was denied (R. 99), and his application for rehearing to the Supreme Court of Alabama (R. 100), was overruled (R. 100).

Summary of Argument

The grand and petit juries which indicted and convicted petitioner of first degree manslaughter were bodies from which members of the Negro race were arbitrarily and systematically excluded. Although a new jury roll was prepared in 1953 following a state court finding that Negroes theretofore had been barred, the new policy, during seven years of operation, has resulted in but one Negro ever serving on a grand jury and none on petit juries. In a county where there are 7,956 adult male Negroes and 6,940 adult male whites, where 1,800 names are on the jury roll, but only one of twelve is a Negro, the state's burden of rebutting the showing of discrimination has not been met by testimony that a high percentage of persons arrested are Negro, nor by showing that a small, fixed number of Negroes has been selected for each venire.

Argument

The testimony in this case shows that petitioner has made out and supported his charge of systematic exclusion of Negroes from jury service in Dallas County. No Negro has ever sat on a petit jury and only one Negro has served on a grand jury since 1953, when a new jury roll was prepared, allegedly without regard to race.[2]

There are almost 8,000 male Negroes over 21 years of age in Dallas County, many of whom must be presumed qualified for jury service. But no more than 150 of them are presently listed on the jury roll.[3] The venires drawn

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[2] The opinion in *Fikes* v. *Alabama*, 81 So. 2d 303, 309, confesses that prior to the preparation of the 1953 jury roll "There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race."

[3] Testimony was given by five Negro residents of Dallas County including a minister, a mechanic, teacher and a businessman, each

in Dallas County generally contain at least 70 names, but jury commission personnel testified that the number of Negro names drawn for each venire varies between five and eight.

Petitioner submits that it was on just such a showing in *Reece* v. *Georgia*, 350 U. S. 85, 88, that this Court concluded:

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection on the jury list of a relatively few Negroes who would probably be disqualified for actual jury service all point to a discrimination 'ingenious or ingenuous.' Smith v. Texas, 311 U. S. 128."

There are similar statements in several other cases.[4] In each of these case, the Court held that, on such facts, a *prima facie* case of race discrimination was established which the state had the burden of rebutting.

In the *Reece* case, *supra*, a showing of no Negro service on the grand jury list caused the Court to conclude that "petitioner's motion stated and his evidence supported a *prima facie* constitutional claim." 350 U. S. at 88. In *Hill* v. *Texas*, 316 U. S. 400, no Negro service on the grand jury in a county with a high percentage of literate Negroes resulted in a finding that "we think petitioner made out a *prima facie* case, . . ." 316 U. S. at 404. In *Pierre* v.

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of whom was not only qualified for jury service, but by virtue of profession and activities, would most likely have heard of Negroes who had actually served. Each said that they had never served on any County Jury, nor had they known of any Negro who had served.

[4] *Hill* v. *Texas*, 316 U.S. 400, 401-403; *Pierre* v. *Louisiana*, 306 U.S. 354, 351; *Neal* v. *Delaware*, 103 U.S. 397.

Louisiana, 306 U. S. 354, 351, similar evidence by petitioner "created a strong *prima facie* showing that Negroes had been systematically excluded—because of race—from the grand jury and the venire from which it was selected."

The State totally failed to show that the long history of all white petit juries and, with one lone exception, all white grand juries in Dallas County was not the result of a policy and practice of the Jury Commission resulting in the systematic exclusion of Negroes from the jury roll.

The State statutes under which the Jury Commission functioned left little doubt as to their duty:

> "The clerk of the jury commission shall, under the direction of the jury commission obtain the names of every male citizen of the county over twenty-one . . ." Tit. 30, Section 18, Ala. Code of 1940, as amended.
>
> "The jury commission, . . . shall make in a well bound book a roll containing the name of every male citizen living in the County who possessed the qualifications herein prescribed . . ." Tit. 30, Sec. 20, Ala. Code of 1940 as amended.[5]
>
> "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment;" Tit. 30, Sec. 21, Ala. Code of 1940, as amended.

In the face of these clear statutory commands, and notwithstanding census figures showing almost 8,000 male Ne-

[5] Section 20 has the effect of requiring that the name of every male citizen possessing qualifications described to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year. Rep. Atty. Gen., 1936-38, p. 355.

groes over 21 in Dallas County, the Chairman of the Jury Commission testified that there were around eighteen hundred names on the jury roll, of which number only one in twelve are non-white.[6] That the Jury Commission Chairman did not believe that most Negroes in Dallas County were qualified is clearly inferable both from the small number of Negroes on the Jury role, and from his testimony, particularly his admission that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. It is this form of discrimination which "can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve," *Hill* v. *Texas, supra* at 404.

The State made much of the fact that on each venire drawn in Dallas County there are listed from five to eight Negroes, some of whom ask to be excused. The petitioner submits that the very uniformity of the Negro representation on the venire smacks of the form of "proportional representation" held invalid in *Cassell* v. *Texas,* 339 U. S. 282, 287; *Shepherd* v. *Florida,* 341 U. S. 50.

The State also elicited testimony from the Sheriff and other Dallas County law enforcement officers to the effect that a high percentage of the arrests made in the County were of Negroes. The Alabama Court of Appeals, without further evidence as to how many Negroes have been arrested, or how many Negroes have been excluded for this

[6] Compare with the opinion in *Fikes* v. *State,* 81 So. 2d 303, reporting that "the Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes. . . ." The testimony here thus indicates that since 1953, not only have no additional names of Negroes been placed on the jury roll in Dallas County, but that from 100 to 150 names have been removed.

reason, interpreted the testimony as, in part, justifyi
the absence of Negroes on the County's juries. Howeve
such testimony falls far short of explaining why not ev
one Negro has ever served on a petit jury, and why on
one Negro has served on a grand jury.

The procedure employed here is quite similar to th
held invalid by this Court's ruling in *Cassell* v. *Texa*
supra. There Mr. Justice Reed found that it was not ha
to ascertain an individual's qualifications for jury servic
and that it was reasonable to assume that a large porti
of the Negroes of Dallas County had the statutory requi
ments for jury service. He held that it was the duty
the Commissioners to familiarize themselves fairly wi
the qualifications of the eligible jurors of the County wit
out regard to race or color.

In a long line of decisions since *Strauder* v. *West Vi*
ginia, 100 U. S. 303, this Court has reversed state crimin
convictions because of systematic exclusion of the defe
dant's race from grand and petit juries. See *Eubanks* v.
Louisiana, 358 U. S. 584, 585. As a result, many co
munities have sought to give the appearance of complian
without according the substance.

In the past, this Court has found in even the most i
genious of these schemes the same fatal defect prese
in the case here: the insufficiently explained reason as
why in a county where at least 53 per cent of the eligib
Negroes are potentially qualified for jury service, there
a steadily decreasing number of Negroes listed on t
jury roll, only a token number of whom have been list
on each venire, and only one of whom has served over
period of years.

Here, as with many other cases of jury discriminati
heard by this Court, the statutory scheme is not in its

unfair, and is capable of being carried out with no racial discrimination whatsoever; but as was the situation in *Smith* v. *Texas*, 311 U. S. 128, 131, "by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."

Clearly, the Constitution entitles petitioner to more than the Jury Commissions' protestations of impartial selection of jurors in Dallas County. *Reece* v. *Georgia*, 350 U. S. 85; *Hernandez* v. *Texas*, 347 U. S. 475. As was said in *Smith* v. *Texas*, *supra* at 130, "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

Therefore, the petitioner maintains that if they are to have meaning, his rights under the equal protection clause must not be limited to merely prohibiting jury officials from placing only the names of whites on the jury list, by statute, *Strauder* v. *West Virginia*, *supra*, or by policy, *Neal* v. *Delaware*, 103 U. S. 370; or placing Negroes' names on the list in such a manner as to make them easily identifiable, *Avery* v. *Georgia*, 345 U. S. 559; or limiting to one the number of Negroes on each grand jury, *Cassell* v. *Texas*, *supra*.

Rather, the Court must continue, as in the past, to examine the jury selection system as to its result. As was said in *Eubanks* v. *Louisiana*, 356 U. S. at 585, "Our only concern here is with the application of this established principle to the facts disclosed by the record now before us." An absolute blank in the number of Negroes selected for petit juries, and but one exception in a recorded history of Negro exclusion from grand juries, is hardly met by protestations of good faith and evidence of fixed token number of Negro veniremen each year.

Petitioner does not challenge the system of selecting jurors in Alabama as such, but as in *Eubanks, supra,* he does contend that as administered in Dallas County, it has resulted in a predictable handful of Negroes being chosen for each venire, all but one of whom, by reason of chance illness, or easily obtained excuse, has failed actually to serve.

Under such circumstances, it is clear that the decision of the Alabama Court of Appeals would sentence petitioner to imprisonment contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Title 30, Alabama Code of 1940

§3. Persons exempt from jury duty.—The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any boat plying the waters of this state; passenger bus driver-operators, and driver-operators of motor vehicles hauling freight for hire under the supervision of the Alabama public service commission; railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa county and the Searcy hospital in Mobile county; officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service and convict and prison guards while engaged in the discharge of their duties as such.

§18. Duties of clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every male citizen of the county over twenty-one

and under sixty-five years of age and their occupation, pl
of residence and place of business, and shall perform
such other duties required of him by law under the dir
tion of the jury commission.

§20. Jury roll and cards.—The jury commission sh
meet in the court house at the county seat of the seve
counties annually, between the first day of August and
twentieth day of December, and shall make in a well bou
book a roll containing the name of every male citizen livi
in the county who possessed the qualifications herein p
scribed and who is not exempted by law from serving
juries. The roll shall be arranged alphabetically and
precincts in their numerical order and the jury commiss
shall cause to be written on the roll opposite every na
placed thereon the occupation, residence and place of bu
ness of every person selected, and if the residence has
street number it must be given. Upon the completion
the roll the jury commission shall cause to be prepa
plain white cards all of the same size and texture and sh
have written or printed on the cards the name, occupati
place of residence and place of business of the person wh
name has been placed on the jury roll; writing or printi
but one person's name, occupation, place of residence a
of business on each card. These cards shall be placed i
substantial metal box provided with a lock and two ke
which box shall be kept in a safe or vault in the office
the probate judge, and if there be none in that office,
jury commission shall deposit it in any safe or vault in
court house to be designated on the minutes of the co
mission; and one of said keys thereof shall be kept by
president of the jury commission. The other of said k
shall be kept by a judge of a court of record having juri
other than the probate or circuit court, and in count
having no such court then by the judge of the circuit cou

for the sole use of the judges of the courts of said county presiding jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction.

§21. Qualifications of persons on jury roll.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.

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JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

October Term, 1960

No. 326

LEWIS LLOYD ANDERSON,

Petitioner,

vs.

STATE OF ALABAMA

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA BRIEF AND ARGUMENT OF RESPONDENT

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INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision Involved	2
Statement	2
Summary of Argument	5
Argument	6
Conclusion	13
Certificate	14

TABLE OF CASES CITED

Page

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286 ..... 7, 11

Lewis Lloyd Anderson v. State, 40 Ala. App. 509, 120 So. 2d 397, Cert. Den. 20 So. 2d 414 ..... 1, 9, 10

Bailey v. Henslee, 184 F. Supp. 298 12

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 9

Fikes v. State, 263 Ala. 89, 81 So. 2d 303, 309, Reversed 352 U. S. 191 9

Hernandez v. Texas, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667 ..... 6, 12

Speller v. Allen, 344 U.S. 443, 73 S.Ct. 397,417 97 L. Ed. 469 9

Smith v. Mississippi, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900 6

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402 8

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383 8

Wimbush v. State, 237 Ala. 153, 186 So. 145 9

STATUTES CITED

Page

Code of Alabama 1940, Title 14, Section 320 2

Code of Alabama 1940, Title 30, Section 3, as amended 8

Code of Alabama 1940, Title 30, Section 38 8

Code of Alabama 1940, Title 30, Section 46 9

Code of Alabama 1940, Title 30, Section 60 10

Code of Alabama 1940, Title 30, Section 64 10

United States Code:
Title 28, Section 1257(3) 2

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LEWIS LLOYD ANDERSON,

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STATE OF ALABAMA

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF AND ARGUMENT ON THE MERITS BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

Lewis Lloyd Anderson v. State of Alabama, 40 Ala. App. 509, 120 So. 2d 397. The opinion of the Supreme Court of Alabama, denying certiorari and denying the application for rehearing, is reported at 270 Ala. 575, 120 So. 2d 414. The decision of this Honorable Court granting certiorari is reported at 5 L. Ed. 2d 100.

II

JURISDICTION

The petitioner has been granted a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered November

10, 1959, rehearing denied on December 1, 1959, under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

The petition in this case presents the following questions:

1. Whether the petitioner, who stands convicted in the State of Alabama of first degree manslaughter, as defined by Title 14, Section 320, Code of Alabama 1940, was indicted by a grand jury and convicted by a petit jury from which Negroes were systematically excluded by the Jury Commission of Dallas County, Alabama, contrary to the provisions of the Fourteenth Amendment. The State of Alabama contends that Negroes were not systematically excluded from jury service on said juries.

2. Whether the equal protection clause of the Fourteenth Amendment to the Constitution of the United States entitled petitioner to any percentage of racial representation in the grand jury which indicted him or in the petit jury which convicted him.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Dallas County, Alabama, of first degree manslaughter and sentenced to ten years' imprisonment. Before entering upon the trial in said Circuit Court, the petitioner filed

motion to quash the indictment. He also filed a motion to quash the venire, followed by a motion to declare void the composition of the jury sworn to try the defendant, all motions alleging systematic exclusion of Negroes from jury service. The petitioner then brought out testimony of the circuit solicitor that since August, 1954, no Negroes had served on grand juries, but that each and every venire from which grand and petit juries were selected contained a number of Negroes, the largest number being seven or eight; that the number of Negroes in the venire drawn for the trial of this case contained five Negroes, three of whom were excused (two of these for illness and one over age) and that two Negroes were left on the present venire. The Circuit Clerk testified that Negroes were drawn every session of Court as jurors, but that there was no identification as to race on the card drawn from the jury box. The present Clerk of the Jury Commission testified that her job was clerical work and she had no way of knowing whether the names on the jury roll were white or colored, and that she had no knowledge of the race of those who served on grand juries. The Deputy County Solicitor could recall only one Negro serving on the grand jury around 1954. Petitioner then called five Negroes who had never served on the grand jury and could recall no Negro having thus served. Cross-examination brought out that their knowledge of courts was rather sketchy. Petitioner called Glenn Defke, Chairman of the Jury Commission since April, 1954, who stated he went to different parts of the country and asked about different prospective jurors and interviewed both Negroes and whites the same way; that in precincts where he didn't know the Negroes he would ask some good white man; that, when selected as veniremen, the name of each venireman is placed on a card and put into the box with no identification as to race. Defke was reared in Colorado and testified that the only precinct that he could positively testify as to number of people on the jury roll was Martin's Station, Alabama, where he has resided since 1919; that of the seven people on the jury roll from his precinct four were Negroes and three were whites. He further testified that the total number of jurors on the register was eighteen hundred and that one in ten was Negro, but that both of these figures were guesses on his part.

Terrell Hicks testified that he served on a grand jury in 1954 with a Negro named Dawson (R. pp. 45,46).

The Sheriff of Dallas County, Alabama, testified that since November 8, 1955, when he became Sheriff, it was his duty to serve subpoenas on people to come and serve on juries and that he had never served such subpoenas when there were no Negroes called to jury duty; that the number of Negro jurors varied from two to six and that the average number of jurors summoned is sixty to seventy or sixty to ninety-five. (R. pp. 47-50.)

There was testimony given that about seventy-five percent to eighty-five percent of the arrests in the city and county were Negroes, including repeaters.

The books containing the jury rolls were never requested nor produced in Court to show exclusion of Negroes.

No testimony was introduced to show fraudulent drawing from the jury box for the venire or from the bat (or box) in picking a grand jury panel or a deliberate wilful passing over all qualified Negroes in making up the original list. Nor was any testimony introduced to show how the State and petitioner chose to exercise the striking of the jury.

After hearing the testimony and considering the evidence offered by both petitioner and the State, the trial court overruled the motions.

At the conclusion of preliminary motions, petitioner entered a plea of not guilty. Trial was had before a jury which found petitioner guilty of manslaughter in the first degree and fixed his punishment at imprisonment in the Penitentiary of Alabama for ten years. The Court thereupon adjudged petitioner guilty of manslaughter in the first degree and sentenced him to ten years' imprisonment. Petitioner gave notice of appeal in open court and service of sentence was suspended pending appeal. Motion for new trial was overruled. The judgment and sentence of the lower court was affirmed by the Court of Appeals of Alabama, rehearing

therein denied, petition to the Supreme Court of Alabama for writ of certiorari was denied and application to that court was subsequently denied, hence this petition for writ of certiorari.

The evidence was that on January 20, 1959, prosecution witnesses saw petitioner driving a car along Minter Street in Selma, Alabama, headed east at a speed of between sixty and seventy miles per hour; that Minter is an unpaved street in bad condition because of damp weather; that petitioner got to the corner of Church Street, ran into the front bumper of a green Chevrolet headed north on Church; that the momentum carried petitioner's car down Minter Street, where it swung to the right, then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit and fatally injured Tom Reese, a Negro. After swerving to the right side of the street, it went back into the road again, on to the end of the block, where it hit a tree, bounced four feet in the air and turned over.

The defense was that the collision with the green Chevrolet was accidental, that petitioner was not speeding and that petitioner was knocked unconscious at the time of first impact. The conflict in evidence presented a jury question and the jury's verdict was that petitioner was guilty of manslaughter in the first degree.

VI

SUMMARY OF ARGUMENT

The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were arbitrarily or systematically excluded, in violation of the Fourteenth Amendment, from service either on the grand jury which indicted the petitioner or the petit jury which convicted him. Evidence presented by the State nullified any alleged inference or presumption of discrimination.

VII

ARGUMENT

The petitioner filed a motion to quash the indictment (R. p. 2), motion to quash venire (R. p. 5) and motion to declare void the composition of the jury sworn to try defendant (R. p. 7). Alleged systematic exclusion of Negroes from the jury rolls resulting in denial of due process and equal protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in his trial and conviction of manslaughter in the first degree was the basis of these motions. The testimony is set out at length in the record, and is summarized for the convenience of this Court in our statement.

The question as to the sufficiency or weight of the evidence offered in support of claimed racial discrimination or exclusion jury selection is one of fact requiring consideration of the particular proof where several circumstances are to be weighed together in reaching a determination.

To prove racial discrimination, petitioner, after filing his motions, introduced the 1950 Federal census, which disclosed 6,940 male whites over twenty-one years of age and 7,956 male Negroes over twenty-one years of age in Dallas County, Alabama, and followed this by testimony as summarized in our statement and testimony of petitioner that he was a Negro and resident of Dallas County, Alabama.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged discrimination is on the one making the allegation. *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900. The pattern of such proof is stated in *Hernandez v. Texas*, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667:

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof es-

tablished by Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion" has been applied in other cases, and it is available in supply proof of discrimination against any delineated class."

In motions such as filed before the trial court, the movant carries the burden of proof to offer enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude. Respondent submits that the trial court's action in overruling the motions was rightly affirmed by the Court of Appeals of Alabama. As was stated in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286:

"While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect (citing cases) we accord in that examination great respect to the conclusion of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

Respondent submits that the burden of proof was not met by petitioner. While he did show that he was a member of an existing racial class and that some Negroes were qualified for jury service but he failed miserably in the proof that none had been called. The testimony of the Circuit Solicitor, Circuit Clerk and Sheriff discloses that every venire summoned contained an average of seven or eight Negroes, with the normal venire being around seventy persons. Testimony of the Circuit Solicitor further brought out that five Negroes were summoned on the venire from which was selected the

petit jury which tried petitioner; that of these five, two were excused for serious illness and one for being over sixty-five and that two remained on the list.

In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries and the same rule applies in the selection of grand juries. Title 30, Section 38, Code of Alabama 1940, and the fact that in the last five years some Negroes have asked to be excused from jury service is not a showing of any action of respondent or any of its officials to exclude them from juries Whites have likewise been excused.

The testimony of Glenn Defke, Chairman of the Jury Commission, showed that it was the policy of the Jury Commission to interview prospective jurors of both races without discrimination and that no card in the jury box was identifiable as to race. An illustration of such nondiscrimination was that Mr. Defke's precinct had four Negroes and three whites comprising the seven men on jury roll.

In the absence of evidence to the contrary, there is a presumption or inference that the officers in charge of the selection and summoning of the jury have performed their duty fairly and justly without discrimination against eligible class or race. *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

The evidence further showed that the Jury Commissioners of Dallas County, Alabama, had adopted a policy not to include those persons, white and Negro, qualified for jury service on the jury roll who were exempt from such service by reason of Title 30, Section 3, Code of Alabama 1940, as amended. The evidence showed that those responsible for obtaining jurors had fairly and honestly attempted to carry out their duties. Where that is shown this Honorable Court has held in *Thomas v. Texas*, 212 U. S. 278, 53 L. Ed. 512, that there was no evidence of discrimination.

Petitioner contends that the lack of proportional representation of Negroes on the jury roll infers discrimination. Both

the courts of Alabama and the Supreme Court of the United States have held that the lack of proportional representation alone does not constitute discrimination. In *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 496, where defendant contended that discrimination was proved by evidence that thirty percent of those eligible as jurors were Negroes, while only seven percent of the names in the jury box were Negroes, a majority of the Court held that no discrimination against Negroes in the selection of the jury had been shown. Alabama statutory method of picking jurors compares closely with that of North Carolina.

Petitioner further contends that the failure to include every eligible Negro male citizen over twenty-one shows a systematic exclusion of Negroes from the jury roll. There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud in drawing or summoning the jurors. Title 30, Section 46, Code of Alabama 1940; *Wimbush v. State*, 237 Ala. 153, 186 So. 145.

It is respectfully submitted that any evidence of discrimination or exclusion prior to October, 1953, would be inapplicable here in view of the new roll of jurors made up at the time in Dallas County, Alabama.

". . . The commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, and from which the venire was drawn which furnished the grand jury and petit juries here involved. There was nothing on the roll or cards which indicated their race . . . " *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303. (Reversed on another ground 352 U. S. 191)

"Former errors cannot invalidate future trials." *Speller v. Allen*, 344 U. S. 443, 73 S. Ct. 397, 417, 97 L. Ed. 469.

In *Lewis Lloyd Anderson v. State*, 40 Ala. App. 509, 120

So. 2d 397, Cert. Den. 120 So. 2d 414, reference is made to the jury roll as follows:

> "The revision of the jury roll required to be made by statute every year consists primarily of adding names of men newly qualified, and the deletion of those who have died, become disqualifed, or come under a statutory exemption, so that the annual book or roll call carries over a great many names from a prior year. Therefore, we feel warranted in approaching this question in a case tried some five years after the Fikes trial in relying upon the finding of our Supreme Court in that case as an established foundation."

There was no evidence of any other than the normal changes set out in the preceding paragraph brought out by petitioner.

> "It is noteworthy that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they might be examined for the presence or absence of Negroes." *Anderson v. State,* supra.

The reason for this failure is obvious. Petitioner knew that an examination of the jury rolls would have completely destroyed the inference of exclusion which he has chosen to create by means of testimony of five witnesses while disregarding the best evidence, namely, the jury rolls.

Title 30, Sections 60 and 64, Code of Alabama 1940, provides for the manner of striking jurors in noncapital and capital cases, respectively. The record fails to show how the State and defendant chose to exercise the strikes as to the array for the petit jury. The record could have been made to show this on appeal, but such point was not raised except by the inference that the absence of the two remaining eligible Negroes from the petit jury was due to the strikes of the State even though the defendant in the trial below had two strikes to each one allotted the State.

Petitioner has made every effort to show that this case is so nearly like the cases he cites that it should be reversed.

Cases cited by petitioner include such instances as where a jury statute provided that "all white males who are twenty-one years . . . shall be liable to serve as jurors," where no Negro had ever been known to have been on the jury roll, where payment of poll tax was a consideration, where jury box has either different colored or marked cards to distinguish Negro voters, where the judge selected the jury from cards drawn out by him and basing his selection on personal knowledge or reputation in the community, where a token number of Negroes were placed on the jury roll, etc. None of these instances referred to by petitioner in his brief were shown by the evidence to have existed here.

This Honorable Court has consistenty held that proportional representation is not a consideration requisite as to selection of jurors.

In Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1696, 65 S. Ct. 1276, this rule was stated as follows:

> " . . . Fairness in selection has never been held to require proportional representation of races upon a jury. Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667, 670, 671; Thomas v. Texas, 212 U. S. 278, 282, 53 L. Ed. 512, 513, 29 S. Ct. 393. Purposeful discrimination is not sustained by showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried . . . The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by

unequal application of the law to such an extent as to show intentional discrimination."

And in *Hernandez v. Texas*, 98 L. Ed. 866, 347 U. S. 475, 74 S. Ct. 667, the Court in concurring with above case stated:

"His only claim is the right to be indicted and tried by juries from which members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution."

Petitioner was accorded this constitutional right.

In the recent case of Bailey v. Henslee, 184 F. Supp. 298, in denying petition for writ of habeas corpus, the Court concluded that there was no racial discrimination practiced in the selection of the jury panel which tried petitioner. In that case petitioner alleged that the Jury Commissioners in Pulaski County, Arkansas, had purposely limited and restricted the number of Negroes serving on any petit jury panel from 1952 through 1956 and in particular only three Negroes of the thirty-six selected to serve on the regular jury panel and no Negroes out of one hundred selected to serve on the special jury panel. And the jury commissioners each testified they were each familiar with qualified Negroes, but did not select Negroes with the intention of having any particular number, but did select three Negroes on the regular panel. Although the allegations as to number of Negroes on the jury panel was proved, the Court held that though petitioner was not entitled to any percentage of representation on the jury panel which tried him, or to representation, as such, at all, there must be neither inclusion nor exclusion because of race. To comply with the Constitutional requirement as to selection of jurors, race is an irrelevant factor; that the evidence presented did not establish such a patteru of disproportionate representation as to compel the finding that it must necessarily have been achieved through discriminatory limitation upon the basis of race.

Respondent contends that no token representation was

attempted in this case. There was not shown any proof of systematic exclusion of Negroes from the Grand or Petit Juries of Dallas County, Alabama. Rather, the Commissioner used the same standards in selecting all jurors, regardless of race. There was no evidence showing a wilful passing over of qualified Negroes nor of any fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel.

VIII

CONCLUSION

There has been no proof of systematic exclusion of Negroes from the Grand or Petit Juries in Dallas County, Alabama; on the contrary, the evidence conclusively shows the jury box was filled and the venires drawn without regard to race or color.

Respondent submits that petitnoner was indicted, tried, convicted and sentenced properly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served a copy of the foregoing brief and argument on one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Fred D. Gray
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Montgomery, Alabama

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LE COPY

Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 326

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF ALABAMA

PETITIONER'S REPLY BRIEF

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INDEX

PAGE

Argument 1

CITATIONS

Cases:

Cassell v. Texas, 339 U.S. 282 2

Fikes v. State, 263 Ala. 89, 81 So. 2d 303 (rev'd, 352 U.S. 191) 1

Hernandez v. Texas, 347 U.S. 475 2

Hill v. Texas, 316 U.S. 400 2

Reece v. Georgia, 350 U.S. 85 2

Other Authorities:

1950 U.S. Census of Population, Vol. II—"Characteristics of the Population, Part 2, Alabama" 3

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Argument

Faced with a record which demonstrates that no Negro has ever served on a petit jury in the history of Dallas County, and that in all recorded history there has been only one Negro who, on one occasion, served on a grand jury, the State offers two defenses: (1) approximately one in twelve persons on the venire is a Negro; (2) approximately 85 percent of the persons convicted of crime in Dallas County are Negroes.

Concerning the first argument, it is noteworthy that more than half of the adult population of Dallas County is Negro. Following a finding of racial discrimination in 1953 because "probably they [Negroes] had been systematically left off rolls on account of race," *Fikes* v. *State,*

263 Ala. 89, 81 So. 2d 303, 309 (reversed on grounds of coerced confession, 352 U.S. 191), a new jury box was made up. The new box then contained 250 to 300 Negroes out of a total of 1500 names, approximately one in five, *Ibid.* Between 1953 and 1959, when the venire in this case was drawn, this proportion decreased to one in twelve (R. 34). Of the two (R. 47) to seven (R. 14) chosen for each venire, a number of Negroes are not found or have excuses (R. 14). In this case five Negroes were called and three were excused (R. 14-15). And, in this case also, no Negro was selected for the grand jury, and the two remaining Negroes were apparently both struck by the state from the petit jury (R. 62).

Proportional representation in jury selection is, of course, unconstitutional. *Cassell* v. *Texas,* 339 U.S. 282. But the vast disproportion revealed by the record, and the fact that only in 1954 was a Negro actually selected for the grand jury (R. 46), raises a presumption of discrimination which the state is obliged to dispel. *Reece* v. *Georgia,* 350 U.S. 85; *Hernandez* v. *Texas,* 347 U.S. 475. This it has not done.

In fact, the characteristics of the Negro and white populations of Dallas County, while reflecting the well-known depressed status of Negroes in areas like those where the instant case arose, does not reveal any differential which suggests that twelve times (or even more) as many whites are qualified to be called for jury service as Negroes. The majority of the county's population is colored. In this light certain 1950 census figures (the latest available) which, while they present but a gross picture, are illuminating. See *Hill* v. *Texas,* 316 U.S. 400.

For persons over twenty-five years of age the median education for all males in Dallas County is 6.5 years, that

for all females is 7.4 years.[1] The median school years completed for non-whites is 4.7;[2] 4,040 Negroes above the age 25 or over have had more than seven grades of school;[3] 9,230 whites age 25 or over have had seven years of school.[4] For persons over 21 (the age of eligibility for jury service, 30 Code of Ala. §21), the number would be even larger. Education, however, is no exclusive criterion for jury service in Alabama. By specific statutory provision even illiterates may serve on Alabama juries, Title 30, Code of Alabama, §21. Indeed, there are not enough college graduates in the County, Negro and white, male and female, to make up even the 1,800 names on the jury roll. Moreover, to the extent that there are persons with higher education there is the likelihood that they belong to the exempt professions.

In terms of employment there is hardly any justification for the tremendous twelve to one disparity on the jury roll. 2,824 Negroes are farmers or farm managers[5] out of 3,297 for the County as a whole.[6] 447 Negroes are craftsmen and foremen[7] as are 1011 white persons.[8] Significantly, even a cursory examination of the venire in this case (R. 24, 26)

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[1] These figures are derived from 1950 U.S. Census of Population, Volume II—"Characteristics of the Population, Part 2, Alabama." Table 42 (p. 2-86) (males and females 25 years old and older).

[2] *Id.* at Table 44 (p. 2-99).

[3] Derived from *Ibid.*

[4] Derived from Table 42, *op. cit. supra.* To arrive at totals for whites, non-white totals found in Table 44 were deducted from the general totals.

[5] *Id.* at Table 44.

[6] *Id.* at Table 43 (p. 2-91).

[7] *Id.* at Table 44.

[8] Derived from Tables 43 and 44.

indicates that the predominant number of veniremen were farmers, a livelihood in which Negroes are well represented.

There is, therefore, in the general characteristics of the population, no reason why whites outnumber Negroes by so vast a proportion on the jury rolls and why the ratio has been growing. The state's only explanation is that about 85 percent of those convicted of crime in the county are Negroes. This statistic, however, is utterly without meaning for it does not at all indicate what proportion of the Negro population has been convicted of crime. It is absolutely consistent with this statistic that only a minute proportion of the Negroes in Dallas County have ever been guilty of any wrongdoing. Besides, this 85 percent figure includes about 15 to 20 percent traffic offenses (R. 80), other petit crimes (R. 81) and about 25 percent "repeaters" (R. 57) or persons arrested more than once.

In addition there is no explanation of why of the limited number chosen perhaps half are not found or excused. Nor has it been explained why even of these only a solitary grand juror has survived in six years.

It is, therefore, respectfully submitted that the state has not met its burden.

Wherefore, for the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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[May 1, 1961.]

Per Curiam.

The judgment is reversed. *Pierre* v. *Louisiana*, 306 U. S. 354; *Cassell* v. *Texas*, 339 U. S. 282; *Hernandez* v. *Texas*, 347 U. S. 475.